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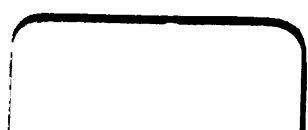
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A TREATISE
ON THE
LAW OF INSURANCE,

INCLUDING
FIRE, LIFE, ACCIDENT, GUARANTEE, AND
OTHER NON-MARINE RISKS,

WITH REFERENCE TO THE
DECISIONS IN THE UNITED STATES, ENGLAND,
IRELAND, SCOTLAND, CANADA, AND THE
OTHER BRITISH PROVINCES.

BY
ARTHUR BIDDLE, M.A.,
ONE OF THE AUTHORS OF A TREATISE ON THE LAW OF STOCK BROKERS;
AUTHOR OF A TREATISE ON THE LAW OF WARRANTIES; MEMBER
OF THE AMERICAN PHILOSOPHICAL SOCIETY.

VOL. I.

PHILADELPHIA:
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I WOULD INSCRIBE

This Book

AFFECTIONATELY AND GRATEFULLY

TO

MY WIFE.

PREFACE.

As contracts of Insurance are perpetually recurring, and as the law applied to them embraces so many refined and subtle distinctions, a new treatise in relation to it may with propriety be demanded, and the appearance of this book is perhaps the natural consequence of these conditions.

The present treatise is an attempt to develop the principles applicable to all branches of non-marine insurance, by regarding the contract of insurance as the fundamental idea of the work, and then by proceeding to consider its structure, the essential elements in its formation, the rights that accrue to the parties to it after it is formed, the capacity to avoid it, its performance, the consequences dependent upon its breach, and the measure of damage. An endeavor has been made to embrace the many principles of law applicable to this subject in as brief and compact a form as possible without being obscure, though the difficulty in this respect is considerable on account of the universality of the contract and the subtlety of the distinctions frequently drawn by the courts. It has indeed been more than once objected by Judges that principles of law have been applied to agreements of insurance differing from those laid down in reference to other contracts ;

PREFACE.

but it is believed that while isolated examples of this may exist, the rules of law which have been laid down with respect to insurance do not differ from other legal principles, when the peculiar nature of the contract is taken into consideration ; and the results obtained are probably as harmonious as those reached in other branches of jurisprudence.

ARTHUR BIDDLE,
505 CHESTNUT STREET.

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ERRATA.

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- Page 38, note 2, the second case should read "*Granger L. & Health Ins. Co. v. Kamper*, 73 Ala. 325."
- Page 61, note 2, should read "*Co-op. F. Ins. Co. v. Lewis*, 12 Lea (Tenn.), 136."
- Page 117, note 5, third case should read "*Richmond, Etc., F. Ins. Co. v. Fee*, 14 Q. L. R. 293, 435."
- Page 141, note 4, third case should read "*E. Carvert Co. v. M'fr's Ins. Co.*, 6 Gray (Mass.), 219."
- Page 151, in fourth line from bottom of text on that page the word "*Meches*" should be "*Meckes*."
- Page 154, in twenty-third line from top of page the plaintiff should be "*Pettigrew*."
- Page 161, note 3, in second line the reference should read "*L. R. 8 C. P. 596*."
- Page 165, note 4, reference should be "*26 N. Y.*"
- Page 182, note 2, *v.* omitted after "*Archambault*."
- Page 204, in § 208, seventh line, "*sole*" should be "*sale*."
- Page 234, note 7, the case should be "*Paradine v. Jane*."
- Page 238, note 6 should read "*Beckman v. Wilson*, 11 Ins. L. J. 732 (Cal.)."
- Page 263, note 4, insert "*Amer. Ins. Co. v. Gallagher*," before words "*50 Ind.*"
- Page 318, note 4, fourth word should be "*Scot*."
- Page 416, note 6, insert "*Rashdall v.*" before "*Ford*."
- Page 481, note 1, sixth line should read "*Beacon L. & F. Assur. Co. v. Gibb*, 1 Moore, etc."
- Page 483, note 1, reference in second line should be "*53 N. Y. 603*."
- Page 498, in fifth line of § 545 insert "*Ins. Co.*" after "*Jefferson*."
- Page 582, note 6, before words "*5 Gray*" insert "*Gloucester M'fg Co. v. Howard Ins. Co.*"
- Page 585, note 7, first word should be "*Conn.*"
- Page 616, note 1, omit "*v.*" in second line.

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- Page 54, last word in fifth line from bottom should be "*Ins.*"
- Page 121, note 2, in second line 2d column insert "*Ib.*" before 537.
- Page 351, note 5, in first line insert "*v.*" after *Miller*.
- Page 407, note 2, in 8th line 2d column erase "*v.*" after *Norwich*.
- Page 497, note 3, erase "*v.*" after *Woodbury*.
- Page 517, note 4, erase "*v.*" after *Rockingham*.

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THE LAW OF INSURANCE.

BOOK I.

FORMATION OF THE CONTRACT.

CHAPTER I.

ITS FORM.

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1. THE general term insurance¹ is applied to two species of contract—insurance in respect of property, and insurance in respect of

¹ The word "assurance" is derived from a barbarous Latin word, *assecuration*, adopted in Italy in the twelfth or thirteenth century, and was the term originally employed in England, the word "insurance" not being in use in the English language in 1583, when

the first recorded case of life insurance came before the English courts, Fowler's History of Insurance, VI., note 1; and there is no difference between the words "insured" and "assured:" Conn. Mut. L. Ins. Co. v. Luchs, 98 U. S. 498; Smith v. Ætna L. Ins.

life, which are not analogous in their elements and which proceed upon different principles.

2. Insurance in respect of property may be defined as an agreement by the insurer, for a consideration, to indemnify the insured against loss, damage, or prejudice to certain property, that may be during a certain period¹ sustained by reason of specified perils to which the property may be exposed.² The subject of the indemnity,

Co., 5 Lans. (N. Y.) 545; though, in *Hogle v. Guardian L. Ins. Co.*, 6 Rob. (N. Y.) 567, it was indeed considered the "assured" meant the beneficiary and not the party procuring the policy. Of course, the policy may be so drawn as to indicate that the parties intended a distinction to be made between the "assured" and the "insured."

¹ This period is often called the "term" of the policy. The word, "term of insurance," in sec. 6 of the Act to incorporate the Jefferson Co. Mut. Ins. Co. of N. Y., Act of 1836, c. 41, means the term of time for which the insurance was, by the policy, to continue: *Bangs v. Skidmore*, 21 N. Y. 136.

² Roccus, in his treatise, remarks: "The contract of insurance is anonymous . . . but the most generally received opinion is that insurance is a contract of purchase and sale; for he who insures for a valuable consideration does, as it were, sell his own obligation, because he binds himself to pay the value of the thing insured in case it should be lost; and the other party, that is, the insured, purchases the obligation:" Roccus, translated by J. R. Ingersoll, note III., page 86. Grotius defined it as "*assecuratio est conventio seu contractus quo quis in se suscipit incertum periculum cui alter est obnoxius qui e contrario eo nomine illi præmium retribuere tenetur*;" as cited by Loccenius, 175, Introduction to the Jurisprudence of Holland, 2d book; Pothier, as "a

contract by which one of the contracting parties charges himself with the risk of the fortuitous accidents to which something is exposed, and obliges himself to indemnify the other from the loss which those accidents may occasion in cases of their happening in consideration of a sum of money which the other contracting party gives as the price of the risk with which he is charged:" *Traité des contrats Aleatoires*, sec. 2; Sir Wm. Blackstone, as "a contract between A. and B.; upon A.'s paying a premium to the hazard, B. will indemnify or secure him against a particular event:" Lawrence, J., in *Lucena v. Crawford*, 2 B. & P. N. R. 301, as "a contract by which one party, in consideration of a price paid to him, adequate to the risk, becomes security to the other that he shall not suffer loss or damage or prejudice by the happening of the perils specified to certain things which may be exposed to them." This last was approved by Blackburn, J., in *Wilson v. Jones*, L. R. 2 Exch. 150, as the best definition of an interest; and he stated it to be "a contract to indemnify the insured in respect of some interest which he has against the perils which he contemplates it will be liable to." Phillips defined it as "a contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against damages or loss on a certain subject by certain perils:" Phillips on Insurance, 1; and Tindal, C. J., as "a contract in which a sum

though popularly called so, is not the particular article or building named in the contract which may be injured or destroyed, but is the interest of the insured in that article or building. Thus, Lord Hardwicke remarked, in *Sadler's Co. v. Badcock*:¹ "To whom or for what loss are the insurers to make satisfaction? why to the person insured, and for the loss he may have sustained; for it cannot properly be called insuring the thing, for there is no possibility of doing it, and therefore must mean insuring the person from damage." It is therefore necessary the party insured should have an interest in the property during the insurance and at the loss. As the insured's interest in the property, and not the property, is the subject-matter of the insurance, the contract must necessarily be one of indemnity.² But though insurance in respect of property is technically a contract of indemnity, it is not, strictly speaking, intended necessarily to be an absolute indemnification of the insured, nor to place him in precisely the same position he occupied before

of money is paid as a premium in consideration of the insurer incurring the risk of paying a larger sum upon a given contingency:" *Patterson v. Parnell*, 9 Bing. 320. It has been said to be the adoption of a general average contribution in advance of loss: *Fowler's History of Insurance*, Introduction, III.

¹ 2 Atk. 554. See also *Castellain v. Preston*, 11 Q. B. D. 397, per Bowen, L. J.: "What is it that is insured in a fire policy? Not the bricks and the materials in the building, the house, but the interest of the assured in the subject-matter of insurance; not the legal interest only, but the beneficial interest;" and on page 393, per Cotton, L. J.: "The policy is really a contract to indemnify the person insured for the loss which he has sustained, in consequence of the peril insured against which has happened." See the remarks of the court in *Wilson v. Hill*, 3 Met. (Mass.) 66.

² *Dalby v. India & Lond. L. Assur. Co.*, 15 C. B. 365; *Chapman v. Pole*, 22 L. T. N. S. 306; *Britton v. Royal*

Ins. Co., 4 F. & F. 905; *Castellain v. Preston*, 11 Q. B. D. 380; *Brit. & Mercant. Ins. Co. v. Liv.*, Lond. & *Globe Ins. Co.*, 5 Ch. D. 576, 584; *Spare v. Home Mut. Ins. Co.*, 8 Saw. 618 (D. Oreg.); *Commonw. Ins. Co. v. Sennett*, 37 Pa. St. 205; *Gradin v. Rochester German Ins. Co.*, 107 Id. 26; *Hidden v. Slater*, *Mut. F. Ins. Co.*, 2 Cliff. 266; *Wilson v. Hill*, 3 Met. (Mass.) 66; *Franklin F. Ins. Co. v. Hamill*, 6 Gill (Md.), 87; *Cummings v. Chesbire Co. Mut. F. Ins. Co.*, 55 N. H. 457; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; *West. Farmers' Mut. Ins. Co. v. Miller*, 1 Haudy (Oh.), 325; *Miller v. West. Farm. Mut. Ins. Co.*, Id. 208; *Bostick v. Maxey*, 5 Sneed (Tenn.), 173; *State Ins. Co. v. Hughes*, 10 Tenn. 461; *Marchesseau v. Merchants' Ins. Co.*, 1 Rob. (La.) 438; *Clinton v. Hope Ins. Co.*, 1 Ins. L. J. 436 (N. Y.). In *Mason v. Sainbury*, 3 Dough. 61, *Bulmer, J.*, in speaking of a policy against fire, said: "Taken in its narrow form it is only a wager; more liberally construed it is an indemnity." See *post*, §§ 155, 1002.

the loss; but the indemnity intended is simply the repayment to the insured of so much of the insured subject-matter as is lost, at an estimated value or at its then market value.¹ When the parties agree beforehand to estimate the value of the subject insured by way of liquidated damages, the contract or policy which evidences it is called a valued policy;² but when the damages are not thus determined, but left to be estimated on the loss, the contract is called an open one.³ Sometimes the subject of insurance is single, and sometimes the policy includes several. Thus a policy may include a manufactory and various storehouses, or various articles in one or more warehouses, and this latter is called a blanket policy. Another form of the contract is where there is a varying amount of goods in a warehouse or elsewhere upon which there is an insurance to a certain extent; and, as it is obvious, the amount actually covered by the contract is only ascertainable at the time of the fire, in order to protect the insurer and prevent the insured from making his contract apply in effect to a greater amount of goods than is fairly insurable for the consideration paid, it is provided in the contract that the insurer's liability shall be only rateable, that is, that the insured shall not receive the whole of the insurance money, but will stand his own insurer to a certain extent or proportion. This is termed a floating policy, and the clause or proviso an average clause. It is also not unusual, particularly in the United States, to insert various average clauses in contracts that are not "floating," as where the insurer stipulates to be liable only for a specified percentage of the value at the loss, etc., so that the insured shall, to some extent, be his own insurer.

3. The earlier form of insurance in England was probably marine,⁴ then came life, and in 1635 "estates combustible" were insured;⁵ and latterly a great variety of perils have been insured against, as

¹ *Commonw. Ins. Co. v. Sennett*, 37 Pa. St. 208; 1 Phillips on Insurance, Id. 20.

§ 3. See also remarks of Lord Blackburn, in *Aitchison v. Lohre*, 4 Ap. Cas. 755; of Jessel, M. R., in *re Arthur Average Ass'n*, 10 Ch. Ap. 542, note.

² *Irving v. Manning*, 1 H. L. C. 287; see *Lewis v. Rucker*, 2 Burr. 1167; *Forles v. Aspinall*, 13 East, 323; *Lyoom. Ins. Co. v. Mitchell*, 48 Pa. St. 372;

³ Remarks of Thompson, J., in *Commonw. Ins. Co. v. Sennett*, 37 Pa. St. 208.

⁴ *Arnould on Marine Insurance*, 123, 6 ed.; *Sadler's Co. v. Badcock*, 2 Atk. 554.

⁵ *Fowler's History of Insurance*, VII.

injury from lightning, explosion, storms or tornadoes, breakage to plate-glass windows, whether in transit or in place, the dishonesty or infidelity of servants or officials, and also the liability of a contractor to pay for injuries to his workmen, under the Employer's Liability Act, 1880 (43 and 44 Vict., c. 42).¹ In *Home Lightning-Rod Company v. Neff*,² an example is had of a company organized to supply houses with lightning-rods according to a sample, and to insure the houses of the people supplied against damage by lightning. It is to be observed, however, that the particular subject does alone not necessarily determine the character of the insurance. As where the hazard was fire alone, and the interest was in the property of an unfinished vessel never afloat, the contract was stated by the court to be fire and not marine insurance.³

4. Insurance in respect of life, which is substantially the purchase by the insured from the insurer of a reversionary interest for a present sum of money, may be defined to be an agreement by the insurer to pay to the insured or his nominee a specified sum of money, either on the death of a designated life⁴ or at the end of a certain period, provided the death does not occur before, in consideration of the present payment of a fixed amount, or of an annuity till the death occurs or the period of insurance is ended.⁵ And it

¹ See *Morrison v. Scot. Employer's Rtc. Liability Co.*, 16 C. S. C. (4th ser.) 212.

² 12 Ins. L. A. (Iowa) 97.

³ *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 526.

⁴ The life is not necessarily the insured; he is not so unless he is a contracting party: *N. Amer. L. Ins. Co. v. Wilson*, 111 Mass. 542.

⁵ The eminent Baron Parke defined it as "a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated, in the first instance, according to the probable duration of the life; and, when once fixed, it is constant and invariable:" *Dalby v. India & Lond. L. Assur. Co.*, 15 C. B. 365, which was

approved in *Elliott's Ap.*, 50 Pa. St. 75. Park, in his book on insurance, defines life insurance to be a contract "by which the underwriter, for a certain sum, proportioned to the age, health, profession, and other circumstances of that person whose life is the object of insurance, engages that the person shall not die within the time limited in the policy; or, if he do, that he will pay a sum of money to him in whose favor the policy was granted" (in chap. xxii., beginning); Bunyon, as "a contract in which one party agrees to pay a given sum upon the happening of a particular event contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum or certain periodical payments by another:" *Bunyon on Insurance*, 1. In *Commw. v. Wetherbee*,

may be said theoretically to be a contrivance for accumulating for the benefit of the insured, by the payment of an annuity or a present sum, the accumulation being paid to the insured or his appointee at the time fixed or contingent upon the event designated, and the amount of the annuity or present sum being calculated on the probable duration of the insured's life or period of insurance.¹ Life insurance is not in any sense a contract of indemnity,² though in the English case of *Godsall v. Boldero*,³ it was so held; but that case proceeding on false analogies, after having been almost universally condemned, and its principles not even taken advantage of by the principal life insurance companies in England, was finally reversed in *Dalby v. India & London L. Assur. Co.*⁴ As the contract is not one of indemnity, no interest was necessary, by the common law, to its validity, and wagering contracts of life insurance were clearly valid.⁵ But the Statute of 14 Geo. III., c. 48, necessitated in England the existence of an insurable interest in the life, at least at

105 Mass. 149, 160, it was defined as "an agreement by which one party, for a consideration (which is usually paid in money, either in one sum or at different times during the continuance of the contract of the risk), promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest." In *Scot. Widow's Fund v. Buist*, 3 C. S. C. (4 ser.) 1078, p. 1081, Rt. Hon. Jno. Inglis defined it "as a mutual contract, by which the insurance company or insurance society, on the one hand, come under an obligation to pay a certain sum of money upon the death of the assured, and the assured, on the other hand, becomes bound to pay certain sums, either annually or otherwise, in the name of premiums, and these obligations are counterparts of one another."

¹ See *Dalby v. India & Lond. L. Assur. Co.*, 15 C. B. 365.

² *Dalby v. India & Lond. Assur. Co.*, 15 C. B. 365, overruling *Godsall v. Boldero*, 9 East, 72; *Law v. Lond. In-*

disputable L. Policy Co., 1 K. & J. 223; *Scott v. Dickson*, 108 Pa. St. 6; *Corson's Ap.*, 113 Id. 438; *Law v. Lond. Indisputable L. Policy Co.*, 1 K. & J. 223; *Roberts v. New Eng. Mut. Ins. Co.*, 2 Dis. (Oh.) 106; *Conn. Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457; *Robinson v. Duvall*, 9 Ins. L. J. (Ky.) 897. See *post*, § 183.

³ 9 East, 72.

⁴ 15 C. B. 365. In *Bevin v. Conn. Mut. L. Ins. Co.*, 23 Conn. 244, there is a *dictum* to the effect that a life insurance is one of indemnity; but this case was decided in the same year as *Dalby v. Ind. & Lond. Assur. Co.*, 15 C. B. 365, and the *dictum* was not necessary, and was given on an apparent misapprehension of the English statutes and the real nature of the contract.

⁵ See remarks of Parke, B., in *Dalby v. India & Lond. L. Assur. Co.*, 15 C. B. 365; *Cousins v. Nantes*, 3 Taunt. 513; *Lucena v. Crawford*, 2 B. & P. N. R. 269; *Crawford v. Hunter*, 8 T. R. 242.

the formation of the contract, and the Statute of 29 and 30 Vict., c. 42 (1866), in Ireland.¹ In most of the courts in the United States a somewhat peculiar rule prevails. It is generally held that life insurance, though not a contract of indemnity, is still not absolutely a wager, but must have some interest to support it, though the interest need not exist both at the inception and the death,² but in Rhode Island and New Jersey the rule of the English common law is maintained.³ In England the interest has been held to mean a pecuniary interest, while in the United States it has been considered that the interest need not be pecuniary, though what interest is necessary is somewhat uncertain.⁴

5. There are various kinds of insurance in respect of the person or life. The contract may be for a person's life or for a certain period; or it may depend upon a contingent event, as if A. should die before B. In what may be termed a life-policy simple, the insurer pays the insurance money at the death of the life designated; in a strict "endowment" contract he pays it at the end of the "endowment" period if the insured survive it, while in a mixed contract of life and endowment it is paid either at the end of the period fixed or on the death of the life, if that occur first. Usually, in insurance companies of a mutual or co-operative character, the insured is compelled to pay an annual sum of money, which is in excess of what is necessary for the expenses and losses or payments of the insurer, in order to provide for extraordinary contingencies, and this excess, or a portion of it, is returned to the insured by way of a bonus or dividend. There also exists a form of life insurance

¹ Wagers were apparently formerly valid in Ireland, and it was held the statute of 14 Geo. III. did not extend to that country. See *Schannon v. Nugent*, 1 Hayes (Ir.), 536; *Scott v. Roose*, 3 Ir. Eq. R. 170; *Schwieger v. Magee*, 1 Cooke & Alcock (Ir.), 182; *Goram v. Sweeting*, 2 Saund. 200.

² *Warnock v. Davis*, 104 U. S. 775; *Conn. Mut. L. Ins. Co. v. Schaffer*, 94 Id. 457; *Franklin L. Ins. Co. v. Hazard*, 2 Ins. L. J. (Ind.) 180; *Loomis v. Eagle L. & H. Ins. Co.*, 6 Gray (Mass.), 396; *Lord v. Dall*, 12 Mass. 115. In New

York, after some conflict, the matter was settled against wagers, in *Ruse v. Mut. Ben. L. Ins. Co.*, 23 N. Y. 516. See also *Scott v. Dickson*, 108 Pa. St. 14.

³ See the excellent opinions in *Mowry v. Home L. Ins. Co.*, 9 R. I. 354; and in *Trenton Mut. Ins. Co. v. Johnson*, 4 Zab. (N. J.) 576.

⁴ See remarks of Shaw, C. J., in *Loomis v. Eagle L. & H. Ins. Co.*, 6 Gray (Mass.) 396; *Conn. Mut. L. Ins. Co. v. Schaffer*, 94 U. S. 457; of Field, J., in *Warnock v. Davis*, 104 Id. 775; also *Corson's App.*, 113 Pa. St. 444.

called the Tontine plan,¹ which, roughly speaking, is where the insurer arranges a number of lives offered for insurance in a class, charging them a higher consideration than is necessary for the expenses, etc., which surplus he places in a special fund, to be accumulated by him during the period of insurance, which is termed the Tontine period, and to be paid to the insured at the end of the period; to which is added the insured's share of the fund arising from payments on forfeited or lapsed contracts made before they had lapsed or were forfeited, as well as the insured's share of the reserve fund. Coupled usually with this plan is an agreement by the insurer to pay a specified amount of money if the life die, or, as it is termed, "fall in" before the completion of the period. And all these general forms of insurance are variously modified. It is very common also for insurers to issue, for a consideration, tickets to passengers on railways, etc., in the nature of policies of insurance against accident, to any one who applies; and companies are also formed, frequently in the nature of benevolent associations, to pay a certain weekly or monthly sum during periods of disability from accident or sickness. A peculiar form of insurance also exists, which is made to depend upon the contingency of lawful issue to specified persons, and the risk may either be coupled or not with some contingency dependent upon the duration of human life, such as the attainment of a particular age by the issue. A more common case of this kind is that in which a tenant for life, under a settlement, is entitled to the reversion in fee simple, subject to an estate tail in his own issue by the particular marriage, and is desirous of mortgaging the estate without burdening his life-interest with the premiums of insurance on his own life. In such a case, after the lapse of a considerable number of years of the marriage without the birth of a child, the probability of issue being small, the premium would not be excessive. An example of this is had in *Browne v. Price*.² The principal elements to consider in this form of insurance are the age and health of the party, and the age at

¹ Tontine insurance was originally invented by Lorenzo Tonti, an Italian, and was adopted in the first place by government as a means of raising a loan, and in return for a sum paid the government agreed to grant annuities to a certain number of people; the share of whom, when one died, was divided among the survivors, till all died, when the government took the fund.

² 4 C. B., N. S., 598.

which women will cease to bear children.¹ Insurances have also been issued against being drawn by the ballot of a draft for service in the army.

6. It may not be amiss to contrast some of the differences existing between insurances in respect of property and of life. Both species of contract are so far alike that they are aleatory in their nature.² As the insured is confined to an indemnification for his loss in insurances in respect of property, it is immaterial, unless the contract expressly provides otherwise, how many contracts of insurance he may make, or with how many parties, in respect of the same subject-matter;³ nor is the amount material;⁴ while in the case of a life contract, not being one of indemnity, a man may procure as many policies as he fancies and be paid on all, and may fix on the life any value he pleases. Again, in contracts of property insurance, there is uncertainty as to time and as to event. For instance, a storm or fire is not inevitable; while in life insurance the time for payment, or the death, must inevitably take place.⁵ Moreover, the interest insured must in the one case change in hazard or value and not necessarily in the other. Again, in insurance as to property, the contract is usually for a set time and not perpetual, nor is there an exclusive right to renew, till the accident shall occur; while in life contracts the agreement is till death or till death within a cer-

¹ See Bunyon on Insurance, 98. In insurance against the birth of issue it is essential to know at what age women are presumed to be past the age of child-bearing. In *Leng v. Hodges*, Jac. Ch. 585, the presumption was held to arise at sixty-nine; in *Brown v. Pringle*, 4 Hare, 124, at sixty-six; in *Dodd v. Wake*, 5 DeG. & S. 226, at sixty-five; in *Brandon v. Woodthorpe*, 10 Beav. 463, at sixty-three; in *Miles v. Knight*, 12 Jur. 666, at fifty-eight; in *Lydden v. Ellison*, 19 Beav. 565, at fifty-six; in *Fraser v. Fraser*, Jac. Ch. 586, at fifty-five, money was paid, though the court required refunding bonds; but in *Overhill's Trusts*, 17 Jur. 342, the court declined to admit such a presumption at the age of forty-nine; and there is an instance mentioned in Coke

of a female bearing a child at sixty: Co. Lit. 40, b. Apparently there is no age at which there will arise the presumption that a man may not beget children, certainly, at least, not before ninety-five: *Trevor v. Ib.*, 2 Myl. & K. 675; *Lushington v. Boldero*, 15 Beav. 1.

² *Bird v. Penn Mut. Ins. Co.*, 5 Big L. & Acc. Cas. (E. D., Pa.) 491; *Alliance Mar. Assur. Co. v. La. State Ins. Co.*, 8 La. 1.

³ *Millaudon v. West M. & F. Ins. Co.*, 9 La. 27.

⁴ *Flanagan v. Camden Mut. Ins. Co.*, 1 Dutch. (N. J.), 506.

⁵ *Dalby v. India & Lond. L. Assur. Co.*, 15 C. B. 365; *Bird v. Penn Mut. L. Ins. Co.*, 5 Big L. & Acc. Cas. (E. D., Pa.) 491.

tain period, and there must be a perpetual renewal, or rather agreement, to continue the insurance till the contingency occurs.¹ Again, insurance on property is regarded as a personal agreement with the insured and not as an incident to the property insured; nor is it in its nature necessarily assignable, for the specific property is not insured, but the interest of the person in that property,² though with the insurer's consent it may be; while a life contract in its nature is assignable.

7. A contract of reinsurance is where the insurer, in order to lessen his own liability on the contract of insurance, reinsures or transfers the insurance he has agreed to carry in whole or in part to a new insurer, who thereupon occupies the same position to the original insurer as the original insurer does to the original insured, which latter is not a privy, however, to this new contract.

8. The party who obtains the insurance and pays the consideration is called the insured or assured, and the party who agrees to indemnify or pay the insured, the insurer³ or underwriter,⁴ and the subject of a contract of life insurance is often termed the "life;" while in a contract of reinsurance the original insurer is termed the reinsured, and the new insurer the reinsurer.

9. The parties must not be only able to make a legal contract, but must further not be under any disability from making this special form of contract. Thus, for example, in England, by the Act of 6 Geo. I., c. 18, monopolies for the assurance of ships and merchandises at sea, or going to sea, for lending money upon bottomry, were granted for thirty-one years to the Royal Exchange Assurance Company and the London Assurance Company; and "all other corporations and all partnerships were forbidden from underwriting

¹ See remarks of Parke, B., in *Dalby v. India & Lond. L. Assur. Co.*, 15 C. B. 365; of Cadwalader, J., in *Bird v. Penn Mut. L. Ins. Co.*, 5 Big L. & Acc. Cas. (E. D., Pa.) 491; of Bradley, J., in *N. Y. L. Ins. Co. v. Statham*, 93 U. S. 24; *Northw. Mut. L. Ins. Co. v. Amerman*, 119 Ill. 329; *Homer v. Guardian Mut. L. Ins. Co.*, 67 N. Y. 478.

² See *supra*, § 2.

³ See *Sadler's Co. v. Badcock*, 2 Atk. 554; *Lynch v. Danzell*, 4 Bro. P. R.

432; *Carpenter v. Providence Wash. Ins. Co.*, 16 Peters, 503; *Desbrow v. Jones*, 1 Har. (Mich.) ch. 48; *Macarty v. Commer. Ins. Co.*, 17 La. 365. But see *N. Y. L. Ins. Co. v. Flack*, 3 Md. 341; *Augusta Ins. Etc. Co. v. Abbott*, 12 Md. 348.

⁴ The word "underwriter" is supposed to have had its origin in the fact that the contract was not signed by both parties, but by the insurer only, who was thence termed the "underwriter:" Park on Insurance, 1.

any policies or making any contracts for the assurance of ships, etc.,” and the premiums for such policies and the sums so underwritten were forfeited.¹ So, in Pennsylvania, it was declared by the legislature unlawful for “any person, partnership, or association to issue, sign, seal, or in any manner execute any policy of insurance, contract, or guarantee against loss by fire or lightning, without authority expressly conferred by a charter of incorporation, given according to law.”²

10. It is also necessary that there be a mutual assent as to all the terms of the contract; that is, that the mind of each contracting party must at some moment of time meet and agree as to all the terms of the bargain. An illustration of this principle is had where property, insured against loss resulting from fire, was damaged by the agency of lightning without combustion, and it was held there could be no recovery, for the agency of lightning is not analogous to that of fire but a different force; and when the underwriter insured against loss by fire he could not reasonably be held to have included loss by another force like lightning, though, had the loss been by ignition resulting from fire, the case would have been otherwise, as fire in such an event would have been the direct, and lightning only the remote cause.³ So an insurance on a “piece of goods” would not render the insurer liable for a loss on “hats.”⁴ When the minds of the parties thus mutually agree to the terms of the contract it is complete, and the risk and policy are said to attach. The evidence of the contract, though not necessarily, is usually reduced to writing by the insurer in a technical form of instrument called a policy⁵ and then delivered to the insured, though such a delivery is not necessarily precedent to the completion of the contract.⁶

11. There must also be a subject-matter of the contract. In a contract of insurance in respect of property the property in respect of which the insurance is taken must exist, and the insured must

¹ Fowler's History of Insurance, 8, note.

² Act 4th Feb. 1870 (Pa.), 1 P. L. 14.

³ See Babcock v. Montgomery Co. Mut. Ins. Co., 6 Barb. (N. Y.) 637;

⁴ Coms. (N. Y.) 326; Kenniston v. Merrimack Co. Mut. Ins. Co., 37 N. H. 256.

⁴ Hunter v. Prinsep, Marshall on Insurance, 255, 4th ed.

⁵ Italian, polizza; French, la police—probably from the Greek *πολυπύλαια*, a tablet with several folds.

⁶ See Clark v. Brand, 62 Ga. 23.

have some interest in it; and in a life contract there must exist some life capable of being the subject of the contract.

12. The last essential element of the contract is a consideration, or, as it is usually termed, the premium. This ordinarily is money, though no reason is observed why it must necessarily be so, for a contract of insurance would, no doubt, be perfectly valid where the consideration agreed to be paid was otherwise than in money; as, for instance, an insurance made in exchange for goods, or in consideration of work and labor done, or in payment of rent, or for any other valuable consideration.¹ When the consideration is not money, the definition of the contract given above in the note by Roccus would not be quite accurate, as it would not be in the nature of a sale, but rather of a barter. The payment of the premium is not precedent² to the formation of the contract, and may be made in any amount or at any period agreed upon. It is usually made annually or in a lump sum in advance. In policies on property, where the risk does not much deteriorate, the consideration or premium is easily arrived at, and is based on the risk, which is uniform, and the expenses, and is necessarily a uniform rate. In life policies, however, as the life is continually progressing to its extinction, a uniform rate was not originally charged; but in the old policies the rate of premium was raised as the life advanced. This was, however, very distasteful to the insured, for some metaphysical or sentimental reason, and the idea was therefore conceived to acquire for the insurer the same amount of money through an average or conventional premium, which should be higher than would be needed during the first part of the period and lower than that which would be required during the last part, which was called a level premium, and was arrived at in somewhat the following manner: For example, if it were found that the actual premiums requisite for the insured to pay on a life policy would be in the ratio of 1, 2, 3, 4, 5, etc., and the duration of the insurance period or the life, say ten years, the conventional or level premium would be arrived at by adding the annual premium in the ratio of 1, 2, 3, 4, 5, etc., up to 10 together, and dividing the sum by the number 10 or the number of years making up the insurable period; in the case thus supposed the total

¹ See *Ky. Mut. Ins. Co. v. Jenks*, 5 Ind. 96. See *post*, § 198.

² See, for example, *Baldwin v. Chouteau Ins. Co.*, 56 Mo. 151. See *post*, § 199.

would be 55, which divided by 10 would be 5.5. The insured would therefore pay annually 5.5 instead of in the ratio of 1, 2, 3, etc., up to 10.

13. In the above calculation we have simply considered what is termed the pure or mathematical premium; that is, the amount necessary for the insured, with a number of others, to pay in order to produce at the end of the estimated period the policy money. It is obvious, if the insured pays a higher rate than is required in the earlier years of his insurance, that the excess must be laid by in order to meet the later deficiency between the conventional or level premium and the actual or theoretical premium required to carry on the business. The pure premium is therefore necessarily composed of two elements: a certain portion which must be devoted to what is called the mortuary fund and another to what is called the reserve fund. In the example given above the insured pays a level premium of 5.5; but if he had gone on paying progressively under the old system as the life deteriorated, he would have paid in the ratio of 1, 2, 3, etc., up to 10. The difference in the first year between the two would therefore have been between 1 and 5.5; in the second year the difference would have been between 2 and 5.5, and in the third year the difference would have been between 3 and 5.5, and so on. Now the actual or progressive premium, 1, 2, 3, and so on, is the portion payable to the mortuary fund, that is to say, the portion which is calculated every insured should pay to make up the sum the company must pay each year on death losses, etc.; and the excess of 5.5 over 1, in the first year, and over the continuing premiums in the succeeding years up to the sixth year, is called the reserve fund, and is put by each year to be accumulated at a rate which will compensate for the difference after the fifth year to the end of the estimated period between the level and the progressive or actual premium. In other words the reserve fund is practically a sinking fund, and it is usually required by statute in each State to be accumulated at a certain percentage. If it is necessary, as it usually is, to have another fund to meet certain extraordinary contingencies which life is subject to during certain years of the insurance period—as, for example, while it may be mathematically certain that a certain number of persons will die during ten, fifty, or a hundred years, yet it may very possibly be that a very much larger proportion will die during a given year and a much less pro-

portion during some other year of the insurance ~~period~~—the insurer, by charging a little more than what is requisite for expenses, ~~can~~ accumulate what may be termed a surplus fund in order to meet these extraordinary contingencies. Of course, the element of interest and of compound interest will greatly change the result in the calculation we have just given, but that is rather a matter of detail than of principle. Very frequently in co-operative and mutual companies the surplus is paid back, or at least a certain proportion of it, if it is found more than necessary, by way of dividends or bonuses. Now to the pure or mathematical premium must be added the amount necessary for the expenses of the company, and this sum is termed the loading of the policy. But as a company must always have some expenses, the premium practically may be said to be made up of three parts: *first*, the loading for expenses; *secondly*, the proportion payable annually to the mortuary fund, and *thirdly*, the amount to be accumulated as a reserve or sinking fund. If a surplus, this may be considered as part of the loading. It must be borne in mind that a level premium is not even now universal; for frequently, as in assessment companies, the progressive premium is made use of.

Having thus briefly shown what are the four essential elements in a contract of insurance and its general nature, we shall proceed to discuss in detail the law relating to the formation of the contract: *First*, with reference to the Parties; *Secondly*, the Mutual Assent; *Thirdly*, the Thing Insured; and *Fourthly*, the Consideration.

THE PARTIES.

CHAPTER II.

THE PARTIES.

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DIVISION I.—WHO MAY BE INSURED.

14. Any one *sui juris* and under no legal disability to contract in general may be insured, and for the ascertainment in general of such disabilities the reader is referred to some book on contracts, it being in this treatise intended only to give such examples of this principle as have occurred in reference to the contract of insurance.

15. In *N. H. Mut. F. Ins. Co. v. Noyes*,¹ it was held, an insurance by an infant on a stock of goods belonging to him, for which he had given his note as the premium, was not binding on him; on the principle that necessities furnished must be for the person and not the estate of the infant, as the guardian was the proper person to care for the latter, Fowler, J. observing: "Although there may be isolated cases where a contrary doctrine has obtained, we apprehend the true rule to be that those things, and those only, are properly to be deemed necessities which pertain to the becoming and suitable maintenance, support, clothing, health, education, and appearance of the infant according to his condition and rank in life; the employment or pursuit in which he is engaged and the circumstances under which he might be placed as to profession or position . . . or whatever relates to his property, is the legitimate business of a guardian, and if transacted by the infant may be avoided at his election."² But such an insurance is not a void contract, but only voidable at the option of the infant on becoming of age.³

16. Of recent years, married women have been generally allowed by statute to make insurance contracts with regard to both life and other policies.⁴ In Rhode Island it was held, where the statute⁵

¹ 32 N. H. 345; see *post*, § 60.

² Citing Coke, Lit. 172, a; *Whittingham v. Hill*, Cro. Jac. 494; *Ive v. Chester*, Cro. Jac. 560.

³ *Monaghan v. Agricult. F. Ins. Co.*, 53 Mich. 238; *New Hamp. Mut. F. Ins. Co. v. Noyes*, *supra*; see *post*.

⁴ For examples, see *Queen Ins. Co. v. Young*, 86 Ala. 424; *Commer. Ins. Co. v. Spankneble*, 52 Ill. 53; *Amer. Ins.*

Co. v. Avery, 60 Ind. 566; *Mut. Benef. L. Ins. Co. v. Wayne Sav. Bk.*, 68 Mich. 116; *Charter Oak L. Ins. Co. v. Brant*, 47 Mo. 419; *McQuitty v. Contin. L. Ins. Co.* 15 R. I. 573.

In England, by the Married Woman's Property Act of 1870, a married woman could insure her own life or her husband's for her own benefit. This Act, and the amendment to it of 1874,

⁵ Pub. Stat. R. I. C. 166, § 21.

substantially enacted that any policy not exceeding \$10,000 expressed to be for the benefit of a married woman, whether effected by her or any one on her behalf, should enure to her separate benefit, that an endowment policy taken out by her was within the statute.¹ Cases may also arise where an insurer would on equitable principles be estopped from repudiating the contract of a married woman incapable of binding herself to it; as where a married woman, incapable of binding herself by her notes, took a policy, paying the premium partly in cash and partly securing it by her notes, the court held the company was estopped from repudiating it for want of consideration, since it must be presumed to have known of her disability and relied on a right given in the policy to deduct the money due from the amount payable on the happening of the contingency or to forfeit it for non-payment; and as it had already received part of the premium in cash, to repudiate it under such circumstances would work great injustice.² In the Province of Quebec, however, it has been lately held that a woman "*commune en biens et sous puissance de mari*" could not make a valid contract of insurance, in respect of her household effects, without her husband's authority.³

DIVISION II.—WHO SHOULD BE INSURED.

17. Frequently a party is under an obligation, by an express or implied contract, or as a result of some legal relation, to procure insurance for the benefit of another. For instance, in English marriage settlements, it is extremely common to find a stipulation that the trustee or husband shall procure and keep on foot policies of

were repealed, however, by the Married Woman's Property Act of 1882 (45 & 46 Vict., c. 75); which, however, still allowed insurances by married women for their own benefit and separate use, and provided that such repeal shall not affect any act done or right acquired while either of the prior Acts was in force, or any right or liability of any husband or wife married before the commencement of the Act of 1882 to sue or to be sued under the provisions of the repealed Acts, for or in respect of

any debt, contract, wrong, or other matter or thing whatever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of the Act of 1882; see *post*, § 178.

¹ *McQuitty v. Continen. L. Ins. Co.*, 15 R. I. 573.

² *Ib.*

³ *Rousseau's La Com. d'Assure Royale*, 1 Montreal, L. R. S. C. 395.

insurance. Thus, in *Arthur v. Wynne*,¹ there was a settlement by which the husband, who had two existing policies on his life that would expire in a couple of years, covenanted before their expiration to take out a new one for £10,000 and assign it to the trustees, and shortly before the expiration of the existing policies he tried to procure a policy, but his health had become so bad that he was unable to effect an insurance; but Sir George Jessel held that did not relieve the husband from his obligation, and consequently that his estate was answerable to the trustees of the settlement.

In *Steen v. Peebles*,² where the settlor, the husband, was unable to keep up the policy settled, the court authorized the trustees to surrender it for a paid-up policy.

On a devise of a freehold for life to a widow, with a remainder over, and certain legacies of personalty to an infant, it was held that the life-tenant and remainder-man should pay insurance for their respective interest, but not the infant, as its estate could in no wise be benefited by insuring the widow's life-estate.³

Where a testator gave to A. implements, &c., in a factory, and the residue to trustees to allow A. the use of the lands and factory without rent, requiring A. to insure, it was held that A. was only bound to insure to the value at testator's death.⁴ It may be observed that a direction by will, to pay out of the testator's property premiums upon a policy effected by the testator on the life of another, is valid during the whole life, and not an accumulation restricted to twenty-one years under the *Thelluson Act*.⁵

18. Another class of persons who are very frequently under an express contract to insure, are consignees, brokers, agents, etc. Where the agreement between the parties to insure is express, it must be explicit, and not a mere request on the part of the principal or consignor.⁶ In a mortgage loan, where it was stipulated the borrower should insure in the name of the lender, and have the loss made payable to the latter, it was held the borrower could sue his attorney for not procuring the insurance as he had contracted, the borrower being entitled to a credit for the amount on the mortgage

¹ 14 Ch. D. 603.

² L. R. 25 Ir. 544.

³ *Kearney v. Ib.*, 17 N. J. Eq. 59.

⁴ *Wiley v. Morris*, 39 N. J. Eq. 97.

⁵ Act of 39 & 40 Geo. III. c. 98. See

Bassil v. Lister, 9 Hare, 177; *Halford v. Close*, Weekly Rep. of 1883, p. 89.

⁶ *McGoldrick v. East. Express Co.*, 1 Pug. (N. B.) 138.

debt.¹ Where the contract is contained in such words as, "the goods will be covered by insurance as soon as received," on the part of the consignee, this does not imply that the consignee will be personally liable as an insurer, but that he will procure insurance for the goods.² So a promise by a carrier to insure, means to procure a policy.³ It frequently happens, in the absence of any express contract, that a prior habit of dealing between parties, or a custom, or usage, will impliedly raise a duty to insure. Thus, for example, if a merchant has been in the habit of procuring insurances for his correspondent in the usual course of trade, the latter is entitled to expect that he will insure unless notified to the contrary.⁴ In *Walsh v. Frank*,⁵ the rule was stated to be, that the shipper's duty, without an order to insure property, depends upon the general custom of merchants, unless there is evidence of some special custom differing from the general one, at the place of shipment, known to the purchaser, which, if known, the implication will be that the parties contracted in reference to it.⁶ An express request by the principal need not precede the insurance on the part of the agent for the former's benefit, but the insurance may be effected without the knowledge of the principal and be subsequently ratified without any previous agreement on the subject.⁷

19. A seller of goods is not bound to insure, nor does the contract of sale impose on him any duty to impart to the buyer any information upon the subject of insurance.⁸ Nor need a factor,⁹ nor warehouseman,¹⁰ insure; nor would persons who by the common

¹ *Collier v. McCall*, 84 Ala. 190.

² *Johnson v. Campbell*, 120 Mass. 449. See also *Arrott v. Walker*, 118 Pa. St. 249; *Lancaster Mills v. Merch. Cotton Press Co.*, 89 Tenn. 1.

³ *Scranton Steel Co. v. Ward's, Etc. Line*, 40 Fed. R. 866 (E. D. Mich.).

⁴ *Smith v. Lascelles*, 2 T. R. 187.

⁵ 19 Ark. 270.

⁶ See *Jacoway v. Ins. Co.*, 49 Ark. 320.

⁷ *Watson v. Swan*, 11 C. B. N. S. 755; *Durand v. Thouron*, 1 Port. (Ala.) 238; *Alliance Mut. Assur. Co. v. La. State Ins. Co.*, 8 La. 1; *Finney v. Fairhaven Ins. Co.*, 5 Met. (Mass.) 192; *Stillwell*

v. Staples, 19 N. Y. 401; *Waring v. Indemnity F. Ins. Co.*, 45 N. Y. 606; *Thompson v. Amer. Tontine L. & Sav. Ins. Co.*, 46 N. Y. 674; *Bridge v. Niag. Ins. Co.*, 1 Hall (N. Y.), 247; *Marts v. Cumberland Mut. F. Ins. Co.*, 44 N. J. L. 478; *Smith v. Cash Ins. Co.*, 1 Pitts. (Pa.) 428; *Conn. F. Ins. Co. v. Kavanaugh*, 5 Montreal L. R. S. C. 262.

⁸ *Bartlett v. Jewett*, 14 Ins. L. J. (Ind.) 7.

⁹ *Schaeffer v. Kirk*, 49 Ill. 251; *Schoenfeld v. Fleisher*, 73 Ill. 404.

¹⁰ *Heaton v. Knowles*, 14 W. N. C. (Pa.) 74. In *Rice v. Nixon*, 13 Ins. L. J. 887 (Ind.), it was held the principle

law are held to occupy the position of insurers to others, as common carriers by land and water,¹ be liable for not insuring the thing committed to their possession.² Nor, it is submitted, would there arise a liability in cases where the carrier has been permitted, by statute or otherwise, to free himself by special contract from the rigid rule of liability in damages for injury to the thing entrusted to him by the common law.³ A mere borrower is not in any sense, however, an insurer.⁴ A carpenter undertaking to build a house on the land of another need not insure it against accident of any kind.⁵

20. It has been held that the failure of a guardian to insure, even when he had funds in his hands for the purpose, would not render him liable as a general rule, but his liability would depend upon the facts of each case.⁶ And it has been held an executor, as a general rule, is not bound to insure, nor to continue the insurance of his testator's property against fire.⁷ But the special circumstances of the case may render an executor negligent in omitting to insure. As in *Garner v. Moore*,⁸ where an executor, without special authority, had insured the life of a debtor of the testator who was apparently unable to pay, but dropped the policy without consulting the parties interested or applying for the directions of the court, in a suit for administration of the estate then pending, the court held, assuming it was an act of sound discretion to effect the original insurance, as it undoubtedly was, it was not an act of sound discretion

that a bailee is responsible for the loss of goods where he commingles them with his own, does not apply where a warehouseman receives grain to be stored for the owner, and the warehouse and contents are destroyed by fire; since the grain could be separated by measurement, and no injury result to the owner from the commingling.

¹ *Rich v. Kneeland*, Cro. Jac. 330; *Morse v. Slue*, 1 Vent. 190. See *Nugent v. Smith*, 1 C. P. D. 423; 1 *Ib.* 19.

² *Lancaster Mills v. Merch. Cotton Press Co.*, 89 Tenn. 1.

³ See *Ib.* And for some of the more important cases on the subject of the relations of the common law and statutory liability of common carriers by

special contract, see *Peck v. North Staffordshire R'way Co.*, 10 H. L. C. 473; *Railway Company v. Lockwood*, 17 Wall. 357; *Phoenix Ins. Co. v. Erie & Western Transp. Co.*, 117 U. S. 312; and see the dissenting opinion of Bradley, J., in same case, 118 U. S. 210; *Rintoul v. N. Y. Cent. & H. R. R. Co.*, and note 23 Am. Law. Reg. n. s. 294; *The Egypt*, 25 Fed. R. 320 (S. D. N. Y.); *Hart v. Pa. R. R. Co.*, 112 U. S. 331; and *infra*, §§ 1287-1289.

⁴ *Beller v. Schultz*, 44 Mich. 529.

⁵ *Clark v. Franklin*, 7 Leigh (Va.), 1.

⁶ *Means v. Earls*, 15 Brad. (Ill.) 273.

⁷ *Bailey v. Gould*, 4 Y. & Coll. 221; *Fry v. Fry*, 27 Beav. 146, by Lord Romilly.

⁸ 3 Drew. 277.

to let the policy drop without consulting the beneficiaries or the Court, or giving any valid reason for the action. Where the testator, as lessee, was under covenant to insure, and the existing insurance expired on the 25th of March, and he died on the 27th without having paid the premium, it was held his executors were not personally liable for not having kept up the insurance, the house being burnt down on the 26th of May.¹

21. In Indiana it was held the trustee of a civil township could not by an insurance contract for the property of the school township, of which he was also trustee, bind the civil township.² In England, where the principal asset of a bankrupt was a contingent reversionary interest which was saleable if there should be a life policy, and the bankrupt refused to be examined, it was held that the English Act of 1883, sec. 24, which obliged him to "aid to the utmost of his power in the realization of his property," and "do all such acts and things in relation to his property . . . as may be reasonably required by the trustee," did not oblige him to submit to a medical examination for the purpose of an insurance.³

22. It has been held by Lord Kenyon, somewhat doubtfully, that where a volunteer, for no consideration, undertook to procure insurance for another, and carried his intentions into effect by getting a policy underwritten, but did it so negligently that no recovery lay on it by the insured, the party procuring the policy would be made to answer in damages for his negligence.⁴ But in *Frauenthal v. Derr*,⁵ in Pennsylvania, apparently a contrary rule was asserted, though in that case the contract was not executed. Though where it is taken by an agent as a mere volunteer without the principal's knowledge, it has been held he may modify or abandon it at his pleasure until his principal has adopted it.⁶

23. But an insurance by the insured's agent in the latter's name binds, if subsequently adopted by the former.⁷ Thus, in *Clement v.*

¹ *Fry v. Fry*, 27 Beav. 146.

⁶ *Stillwell v. Staples*, 19 N. Y. 401.

² *Jackson Township v. Home Ins. Co.*, 54 Ind. 184.

⁷ *Gould v. York Co. Mut. F. Ins. Co.*,

³ *Board of Trade v. Block*, 13 Ap. Cas. 570. See *Re Garnett*, 16 Q. B. D. 698.

47 Me. 403; *Plahto v. Merch. & Mfrs Ins. Co.*, 38 Mo. 248; *Marts v. Cumberland Mut. F. Ins. Co.*, 44 N. J. L. 478; *Waring v. Indemnity F. Ins. Co.*,

⁴ *Wilkinson v. Coverdale*, 1 Esp. 75.

45 N. Y. 606; *People v. Liv. & Lond.*

⁵ 13 W. N. C. (Pa.) 485.

& Globe Ins. Co., 2 T. & C. (N.Y.) 268.

Brit. Amer. Assur. Co.,¹ where there was a limited partnership under the act, consisting of a general partner A. and a special partner B., doing business under the style of "A.," and A. insured in his own name partnership effects, it was held he could recover the full value, and not merely his own interest therein. But the third party's interest will not be covered, unless it was intended to be at the formation of the contract.² Thus, where a partner insured in his own name the partnership's property, and it did not appear it was really for the benefit of the firm, the facts that the premium had been paid from the partnership funds and a subsequent attempted ratification were held immaterial, as one cannot ratify what does not exist.³ In *Pearson v. Lord*,⁴ where one of several owners of a vessel insured in his own name, and it appeared he had covered more than his own portion of the property for the benefit of his co-owners, which was paid him, it was allowed to be recovered back by the underwriter, though the insured had intended to cover more than his share, and the partners had usually insured in the name of one of them, the underwriter being ignorant of the nature of the transaction and paying through mistake. But in a case in Maine, where a partner intended the policy to cover only his own interest, but effected it in the partnership's name, and with the firm's funds paid the premium, though charged by him to himself, it was held to be a partnership's policy, the court remarking it would be a fraud to allow the partner to use the partnership's name and money and then repudiate the firm's interest in the policy.⁵

¹ 141 Mass. 298.

² *Alliance M. Assur. Co. v. La. State Ins. Co.*, 8 La. 1; *Haynes v. Rowe*, 40 Me. 181; *Aldrich v. Equit. Safety Ins. Co.*, 1 W. & M. 272 (D. Mass.); *Newson v. Douglass*, 7 H. & J. (Md.) 417; *Augusta Ins. & Banking Co. v. Abbott*, 12 Md. 348; *Finney v. Fairhaven Ins. Co.*, 5 Met. (Mass.) 192; *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y. 6; *Rogers v. Traders' Ins. Co.*, 6 Paige (N. Y.), 583; *Walsh v. Wash. M. Ins. Co.*, 32 N. Y. 427; *Pacific Ins. Co. v. Catlett*, 4 Wend. (N. Y.) 75; *Jefferson Ins. Co. v. Cotheal*, 7 Ib. 72; *Savage v. Corn Exchange F. & Inland Navigation Ins. Co.*, 4 Bos. (N. Y.) 1. See *De Bolle v.*

Pa. Ins. Co., 4 Whart. (Pa.) 68; *Steele v. Franklin F. Ins. Co.*, 17 Pa. St. 290.

³ *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 202.

⁴ 6 Mass. 81.

⁵ *Tebbetts v. Dearborn*, 74 Me. 392; *Russell v. New Eng. M. Ins. Co.*, 4 Mass. 82. In *Looney v. Looney*, 116 Mass. 283, A., with insurable interest in a house owned by B., insured in B.'s name, and as his agent got the money on a loss. Held, B. could recover it from A., and A. could not show he had intended to cover his own interest. See *Stillman v. Agricult. Ins. Co.*, 16 Ont. R. 145.

24. As the question of what interests are intended is purely one of intention, and the proceeds of the policy can only be subsequently applied for the benefit of those for whom the party taking the policy intended them, it is usual for the insured, in order to show an intention to cover other interests besides his own in the contract, to insert such phrases as "for his own benefit and those whom it may concern," or to insure "on goods his own, while in trust or commission;" and the use of these words will raise a presumption that he did not intend to cover only his own interest.¹ And a policy "for whom it may concern" may issue to one without interest, and the real party in interest for whom it was taken may recover.² It is frequently difficult to determine what particular interests were intended.³ A policy on "goods sold, but not removed," was held to cover goods sold, but still on deposit.⁴ Where it was stipulated that "goods held on storage must be separately specifically insured," it was held a policy to a bailee on goods his own, or held in trust, covered an article left for any business purpose, even though no charges were made to the bailor.⁵

Obviously where there has been delivery, though the goods remain in the custody of the bailee, a policy to the bailee on "goods sold, but not delivered," will not cover them.⁶ It has been held, as only the interest of the nominee is covered, unless some such phrase as "and others whom it may concern" is added,⁷ a custom, that others are usually included in an insurance to one, is bad.⁸ But where a party is known to have concluded a contract as agent, the policy has been held to be "for whom it may

¹ See *Waters v. Monarch F. & L. & M. Ins. Co.*, 45 Conn. 430; *Hough v. Assur. Co.*, 5 E. & B. 870; *Stillwell v. People's Fire Ins. Co.*, 36 Md. 398; *Staples*, 19 N. Y. 401; *Robbins v. Firemen's Fund Ins. Co.*, 16 Blatch. 122 (S. D. N. Y.); *Home Ins. Co. v. Balto. Warehouse Co.*, 93 U. S. 527; *Watkins v. Durand*, 1 Port. (Ala.) 251; *Phoenix Ins. Co. v. Favorite*, 49 Ill. 259; *Johnson v. Campbell*, 120 Mass. 449.

² *Cobb v. N. Eng. Mut. M. Ins. Co.*, 6 Gray (Mass.), 192; *Somes v. Equit. Safety Ins. Co.*, 12 Ib. 531.

³ See *Lond. and Northw. Ry. Co. v. Glyn*, 1 E. & E. 652; *Bishop v. Clay F.*

⁴ *Waring v. Indemnity F. Ins. Co.*, 45 N. Y. 606.

⁵ *Lucas v. Ins. Co.*, 23 W. Va. 258.

⁶ *Lockhart v. Cooper*, 87 N. C. 149.

⁷ *Wise v. St. Louis M. Ins. Co.*, 23 Mo. 80; *Graves v. Boston M. Ins. Co.*, 2 Cranch, 419.

⁸ *Ibid.*

concern."¹ Where the contract is obscure as to the interests intended, parol evidence has been admitted to show those intended.² But where the policy was to one on goods, "his own, or held in trust," the words being clear, parol evidence was not admitted to show that "goods owned" were only under certain circumstances to be covered, and that if the owner had other policies on them, the interest was not intended to be covered.³

25. Where a policy is taken out "on goods their own or in trust or on commission," this will include certainly all the interest the insured has, whether absolute or qualified.⁴ But the party whose interest was intended to be covered can only recover as much as his interest covers.⁵ Thus, in *McDonald v. Black*,⁶ it was held a mortgagee could not claim the benefit of a policy effected upon the mortgaged premises by the mortgagor, if the mortgage of the personalty has become absolute by failure to pay the money, although the mortgagor's policy contained the words "for whom it may concern." An agent of a company can insure one in it without disclosing its name.⁷

26. The question arises, when the bailee or consignee has received payment of the loss from the insurer, whether at all or in what proportion the bailor or consignor is entitled. This depends, of course, upon what the bailee or consignee intended to cover by the policy.⁸ It has been held in Scotland, as a matter of law, that the

¹ *Oliver v. Mut. Commer. M. Ins. Co.*, 2 Curt. 277.

² *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242; *Planters' Mut. Ins. Co. v. Engle*, 52 Md. 468; *F. Ins. Ass'n v. Merch. and Miners' Transp. Co.*, 66 Md. 339; *Douglass v. Newson*, 7 H. & J. (Md.) 417; *Foster v. U. S. Ins. Co.*, 11 Pick. (Mass.) 85; *Shawmut Sugar Refining Co. v. Hampden Mut. Ins. Co.*, 12 Gray (Ib.), 540; *Laurence v. Sebor*, 2 Caines (N.Y.), 203; *Catlett v. Pacific Ins. Co.*, 1 Wend. (Ib.) 561; *Turner v. Burrows*, 8 Ib. 144; *Lee v. Adsit*, 37 N. Y. 78; *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y. 6; *Clinton v. Hope Ins. Co.*, 1 Ins. L. J. 436 (N. Y.); *Fleming v. Ins. Co.*, 12 Pa. St. 391; *First Nat. Bk. v. Lancash. Ins. Co.*, 62 Tex. 461; *Robbins v. Firemen's Fund Ins. Co.*, 16

Blatch. 122 (S. D. N. Y.); *Daniel v. Cit. Ins. Co.*, 10 Biss. 116 (D. Md.); *Mitchell v. City of Lond. F. Ins. Co.*, 12 Ont. R. 706.

³ *Hough v. People's F. Ins. Co.*, 36 Md. 398.

⁴ *Turner v. Stetts*, 28 Ala. 420; *Pelzer Mfg. Co. v. St. Paul F. & M. Ins. Co.*, 41 Fed. R. 271 (D. S. C.).

⁵ *Folsom v. Orient F. Ins. Co.*, 59 N. H. 54; *Charleston Ins. & Trust Co. v. Corner*, 2 Gill. (Md.) 410; *Martin v. Fishing Ins. Co.*, 20 Pick. (Mass.) 389.

⁶ 20 Oh. R. 185.

⁷ *Young v. Hart. F. Ins. Co.* 45 Iowa, 377.

⁸ See *Northrup v. Phillips*, 99 Ill. 449; *Durand v. Thouron*, 1 Port. (Ala.) 238; *Harvey v. Cherry*, 12 Hun (N. Y.), 354.

policy money received on a loss of goods "the insured's own, in trust or on commission," did not go to the owner, if the insurance was less than the loss.¹ Where, however, a claim against the insurer is specifically made by the insured bailee, naming the bailor and proving for the loss of his goods, the latter can recover from the bailee.² But it has been held by some courts that *prima facie* the insurance on goods in trust, etc., will inure to the bailor, who can recover from the bailee on payment by the insurer.³ But it has been held, if the bailee insures for the bailor without his consent, as a volunteer, he may abandon or modify the contract before the ratification by the bailor, and claim the whole to a greater amount than the value of his own; and, where the bailor does not intervene before payment by the insurer, keep the whole.⁴ And where the bailee had surrendered the policy, it was held parol evidence was admissible, on the part of the bailor to prove its contents.⁵

27. Where one of several tenants in common, being in sole possession of the premises and claiming to be solely entitled to the buildings, had insured, his cotenants were held to have no claim to the fund, whatever might be his rights to recover from the insurer, owing to the false representation as to being sole, instead of part, owner, and, as the insurer had paid him, he could keep it.⁶

28. An agent in insuring must strictly follow his principal's instructions.⁷ If he undertake to procure a valid policy, he must do so;⁸ though in Pennsylvania it was held, a broker in undertaking to get insurance was only liable for the want of due diligence.⁹ The principal is bound by the terms of the contract agreed to by the agent.¹⁰ But where the agent is directed to procure a policy, and procures one with certain disadvantageous conditions, he will not be liable if that was the form of policy usual at the place and he

¹ Dalglish v. Buchanan, 26 Sc. Jur. 160.

² Beidelman v. Powell, 10 Mo. Ap. 280.

³ Siter v. Morris, 13 Pa. St. 218; Snow v. Carr, 61 Ala. 363.

⁴ Still v. Staples, 19 N. Y. 401. See also Lee v. Adsit, 37 N. Y. 78.

⁵ Snow v. Carr, 61 Ala. 363.

⁶ M'Intosh v. Ont. Bk., 20 U. C. Ch.

24. See also Annelly v. De Saussure, 26 S. C. 497.

⁷ Sawyer v. Mayhew, 51 Me. 398; Smith v. State Ins. Co., 58 Iowa, 487.

⁸ Schoenfeld v. Fleisher, 73 Ill. 404; Gill v. Balis, 72 Mo. 424.

⁹ Arrott v. Walker, 118 Pa. St. 249.

¹⁰ Tasker v. Kenton Ins. Co., 59 N. H. 438.

could get no other.¹ And if an insurance effected according to instructions from the principal would have been void, no action will lie against the agent for not procuring it.² But if the agent has agreed to get insurance, but limits his broker to so small a sum that no insurance can be had, he will be liable to his principal.³ It was held in *Brooks v. Phoenix Mut. L. Ins. Co.*,⁴ that a husband, who had procured a policy for his wife which by the laws of Vermont insured to her sole use, could not secure payment of the premium notes by a lien on it. A case of great hardship occurred in *Parry v. Great Ships Co.*,⁵ where the defendant, a mortgagor of a ship, was under contract to insure it. On the expiration of the old policy some few days had elapsed in which there was no policy in existence binding in law or upon which one could have sued, though slips had been issued which, according to the custom prevailing among the merchants in England, are considered of equal force in honor as policies, and hardly ever repudiated. It was held, however, that such an engagement did not amount to a policy of insurance in the strict sense of the term, as the underwriters, however bound in honor, incurred no legal responsibility, the Stamp Laws intervening to prevent it, and the mortgagee was allowed to sign judgment, the court not deciding what, if any, equitable remedy there might be. In *Dumas v. Wylie*,⁶ the plaintiffs, owners of precious stones then stolen, posted with the jewels an order to certain brokers to insure them. The next day at half-past eleven a policy was effected at Lloyds, excepting, however, any loss from robbery, as the robbery had become known, and the jury found the brokers had not been guilty of negligence in not effecting the insurance earlier. One who by usage as a factor insures consigned goods for the benefit of his principal may recover the cost of insurance.⁷ But where an agent neglects his directions to insure, he cannot recover against his principal for premiums, though he would have been liable as insurer on a loss.⁸ Where money was to be retained out of a trust fund to pay an extra premium on account of the grantor of an annuity

¹ *Silverthorne v. Gillespie*, 9 U. C. Q. B. 414.

² *Alsop v. Coit*, 12 Mass. 40.

³ *Wallace v. Tellfair*, 2 T. R. 188 n., before Buller, J., at *Nisi Prius*.

⁴ 8 Ins. L. J. 740 (Vt.).

⁵ 10 Jur. N. S. 294.

⁶ Q. B. D., May, 1883, cited Porter on Insurance, 441.

⁷ *Peyton v. Heinekin*, 131 U. S. Cl.

⁸ *Storer v. Eaton*, 50 Me. 219.

going abroad, unless actually paid, no additional charge could be made for it against the fund.¹ It was held by Lord Mansfield that a policy of insurance when effected by a broker becomes the property of the insured ; and, if it be wrongfully withheld, trover lies for it.²

DIVISION III.—WHO MAY INSURE.

29. Any one otherwise able to validly contract, may contract to insure another against a specified peril, unless prevented by some statute.³ A creditor, by bond, however, cannot stand his own insurer and charge the premium to his debtor.⁴ The business of insurance is principally carried on by three classes of insurers.

I. Partnerships ; II. Quasi corporations ; and III. Corporations.

30. I. Probably few common law partnerships now carry on the business of insurance ; but, with the exceptions of the risks taken at Lloyds, and one or two other large partnerships, the great bulk of the business of insurance is carried on by companies, most of which are incorporated.⁵

31. II. Quasi corporations are common in England. The Crown was empowered by the Letters Patent Act to grant letters, under certain regulations, to partnerships formed by deed of partnership, authorizing them to sue and be sued by an officer named for the purpose, and limiting the members' liability.⁶ These are proprietary offices, with a subscribed or guaranteed capital, the partners wherein absorb the whole profits. The Act is not compulsory, and it is still in force, but only applied to companies formed before September 8th, 1844, when the Joint Stock Companies Act was passed.⁷ Another class of what may be called quasi corporations are companies registered or organized under one of the English Joint Stock Companies Acts. The first act was passed in 1844,⁸ and its purpose was to invest companies which registered

¹ *Grey v. Ellison*, 1 Giff. 438.

² *Harding v. Carter*, *Park on Insurance*, 43. See *Johnson v. Campbell*, 120 Mass. 449.

³ In *Cates v. Bales*, 78 Ind. 285, it was held the transfer of a plan or instrument for the organization of a company is of value, as the vendor, before publication, is entitled to its disposition, and it does not cease to be of

value because there is no law authorizing the formation of such company in the State where the transfer was made.

⁴ *Hutchinson v. Wilson*, 4 Bro. C. C. 488.

⁵ *Porter on Insurance*, 361.

⁶ 7 Wm. IV., & 1 Vict. c. 72.

⁷ *Porter on Insurance*, 364.

⁸ 7 & 8 Vict. c. 110.

under it with the qualities and incidents of corporations, in a modified way, and at the same time with several attributes of partnerships. The privileges of the Statute of 7 & 8 Vict. c. 110, are only accorded to those companies registered thereunder, and if registration have been provisionally made as a company the promoters thereof have no right to assume the style of a "corporation," nor to call on the registrar of joint stock companies to register a return of such name.¹ A company established to grant policies, endowments, annuities, to insure during periods of sickness, etc., and to make loans or advances on interest, and duly registered under the above Act of 1844, is an insurance company within the Act of 20 & 21 Vict. c. 14 & 27, and can sue without being registered under the Joint Stock Companies Act of 1856-57.² Certain insurance companies were excepted from the provisions of the Act of 7 & 8 Vict.,³ and in consequence of this exclusion some companies had special acts of Parliament passed. But in 1862, the Companies Act⁴ was passed, enforcing registration on those companies which had been registered under the Act of 7 & 8 Vict., the effect of which was exactly the same as if the company had been formed and registered under the last Act,⁵ and on all insurance companies formed since November 2, 1862.⁶

Companies which ought to have, but have not, been registered as required, are under the disabilities of section 110, and cannot sue at law or equity, nor in any event present a petition for their own winding up.⁷ "Broadly speaking," Mr. Porter remarks in his late work on Insurance,⁸ "by the companies act, 1862, section 22, the legislature intended that all commercial undertakings consisting of more than ten persons, started after the commencement of that Act, should be registered," and "the effect of the compulsory registration is to put the insurance companies within the regulations of the Act.

¹ *Queen v. Whitmarsh*, 19 L. J. Q. B. 185.

² *Lond. & Provin., Etc., Soc. v. Ashton*, 12 C. B., N. S., 709.

³ First, if founded before September 5, 1844, they could not be completely registered or brought within the Act (sec. 50); secondly, if incorporated by charter or Act of Parliament; thirdly, if authorized by letters patent or statute

to sue and be sued: *Porter on Insurance*, 365.

⁴ 25 & 26 Vict. c. 89, s. 209.

⁵ *Ramsay's Case*, 3 Ch. D. 388.

⁶ *Ex parte Hargrove*, 10 Ch. Ap. 545 n.; *re Padstow Ass'n*, 20 Ch. D. 137.

⁷ *Porter on Insurance*, 366; *Waterloo L. Co.*, 31 Beav. 586; *Evans v. Hooper*, 1 Q. B. D. 45.

⁸ Page 366.

Companies which are created for profits to the shareholders, and which also give certain advantages to the policyholders by way of a bonus or a periodical rebate in the premium, but do not admit the policyholders as partners, are the most common in England. And the distinction between a corporation and unincorporated societies is now in England not very material.¹ When the requisite number of persons are formally presented to the registrar of the joint stock companies under the provisions of the Companies Act of 1862, though the applicants are foreigners and there are circumstances to show the company to be registered in several respects is a foreign company, he is not bound to refuse registration. If there are shares in conformity with the statute, though there may be others of a different kind, and the principal business is done abroad, this is no objection.² It was also decided by the Lords Justices in the court appealed from, that if, after registration, such company does not carry on business in this country, it may be wound up.³

32. III. Corporations are formed in England by royal public charter and private Acts. The first charters of insurance companies were monopolies granted by Parliament, and few charters have been granted by the Crown independently of Parliament. But the monopoly granted to the first two insurance companies has since ceased to exist.⁴ Besides the above companies formed for profit, there are various English companies formed for benevolence and to grant annuities, as, for example, the government and annuity department, and the various modes provided by Parliament for the civil service departments in Great Britain and in India.⁵

33. In the United States corporations may be formed under special acts of the different legislative bodies, or by virtue of a general law. In Ohio, where it was provided in chapter 1 of "a title" that "corporations may be formed in the manner provided in this chapter for any purpose for which individuals may lawfully

¹ Cotton, L. J., in *Ashworth v. Munn*, 15 Ch. D. 363; *Myers v. Perigal*, 2 De Geg. M. & G. 599.

² *Princess of Reuss v. Boss*, 5 Kn. & Ir. App. 176, affirming *Re General Co. For the Promotion of Land Credits*: 5 Ch. Ap. 363.

³ *Re General Co. Etc.*, 5 Ch. Ap. 363.

⁴ *Porter on Insurance*, 363.

⁵ See *Boldéro v. E. India Co.* 88, 11 H. L. C. 405; *Underwood's Case*, L. R. 4 H. L. 580; *Edwards v. Warden*, 1 App. Cas. 281; Ch. Ap. 495; *Robertson's Case*, 12 Moore P. C. 400; *Davis v. Trustees*, 12 Moore P. C. 403 n.; 7 Moore Ind. App. 364 n.; *Porter on Insurance*, 361.

associate except for dealing in real estate, etc.," it was held that it must not be construed as authorizing the incorporation of insurance companies, as the organizing of such was specially provided for in other chapters of the same title.¹ When the act of creation violates any of the provisions of the State constitutions, as, for example, in referring to more than one subject, it is void.² When the company is created under a general law, the law itself, and not the articles of incorporation, or constitution, becomes the guiding chart for the nature and extent of its corporate franchises.³ It has been held in New York that any errors in the incorporation of an insurance company are cured by the passage of a subsequent act of the legislature, changing its name; since the legislature has ample power to confirm an organization irregularly formed.⁴ But the New York Act of 1852, which authorized the "Rensselaer Insurance Company," then alleged to have been duly incorporated under the Act of 1849, to take for the future marine risks on complying with certain conditions, was held not to be a legislative recognition of the original validity of the company's incorporation, as the designation of the company was merely descriptive, and the act was only intended to apply in the event of the company having a legal existence, and the legislature did not assume to inquire into the legality of the company's existence.⁵ Where a company has filed papers which show a colorable compliance with the statute, and which are approved by the proper State officials, although so defective as to be incapable of maintaining the validity of the corporation against the State, it has frequently been held the corporation's validity after a proof of use cannot be impeached by persons who have dealt with it as shareholders.⁶

34. A company is not liable for a loss when the contract is made before the company by its charter was authorized to transact business. As where the necessary certificate from the proper officials has

¹ See *State v. Pioneer Live Stock Co.*, 12 Ins. L. J. 145 (Oh.). See chap. I. title 2, of R. S. § 3235, and chaps. x., xi.

² *Geiger v. McLin*, 78 Ky. 232.

³ *Granger L. & Health Ins. Co. v. Kamper*, 73 Ala. 325.

⁴ *White v. Coventry*, 29 Barb. (N. Y.) 305; *White v. Ross*, 4 Ab. Dec. (N. Y.) 589.

⁵ *People v. Rensselaer Ins. Co.*, 38 Barb. (N. Y.) 323.

⁶ *Upton v. Hansbrough*, 5 Chic. L. N. (Ill.) 242

not been obtained.¹ It has been held this is so even where the soliciting agent assured the applicant for insurance that he was insured; as the company had no authority to contract.² Sometimes the company's incorporation is made by the act complete so soon as the stock is subscribed without a formal organization,³ and sometimes the company becomes a body corporate independent of the capital subscribed.⁴ It is often provided that insurance companies must have a specified capital subscribed before doing business.⁵ Where the statute specifies the medium of payment of subscriptions to capital, it must be followed. Thus, subscription in railroad or turnpike bonds is not in "money;"⁶ nor, where the act requires a subscription of "\$100,000," can it be made in "bankable bills."⁷ Where the charter directed the capital should actually be paid in, but allowed the company to invest their capital in bonds, mortgages, and other securities, and the capital was never technically paid in, but securities were received therefor and thus retained, it was held the securities subscribed were not void in the hands of the company because the directors had invested in them at once, instead of going through the formality of taking the money and then paying for the securities.⁸ A requirement for a company to take security for its stock up to a certain amount will not compel it to sell the rest on other terms, as, for instance, without security; for this may be only intended to necessitate the presence of a certain sum before commencing business.⁹ It has been held in a suit by the company against a shareholder on his subscription, that the absence of a strict compliance with the statutes on the part of the corporation is no defence.¹⁰

35. An insurance company, unless specially authorized by the legislature, can neither increase nor diminish the amount of the

¹ *Mfr's & Merch. Mut. Ins. Co. v. Gent*, 13 Brad. (Ill.) 308; *Williams v. Babcock*, 25 Barb. (N. Y.) 109. ⁶ *Commonw. v. Mfr's Ins. Co.*, 2 Pear. (Pa.) 426. See *Judah v. Amer. Live Stock Ins. Co.*, 4 Ind. 333.

² *Mfr's & Merch. Mut. Ins. Co. v. Gent*, 13 Brad. (Ill.) 308.

⁷ *Re Badoock*, 21 Neb. 500.

³ *Judah v. Amer. Live Stock Ins. Co.*, 4 Ind. 333.

⁸ *Yard v. Pacif. Mut. Ins. Co.*, 2 Stock. Ch. (N. J.) 480.

⁴ *Brouwer v. Appleby*, 1 Sand. S. C. (N. Y.) 158.

⁹ *Upton v. Hansbrough*, 5 Chic. L. N. (Ill.) 242.

¹⁰ *Ib.*

⁵ *People v. Flint*, 64 Cal. 49.

capital stock.¹ And, if it be allowed, the particular method pointed out must be observed.² But an irregularity may be cured by way of estoppel.³

36. Shares of stock may be issued either fully or only partially paid for, and the liability of the shareholder to pay the unpaid portion of his stock is an asset of the corporation, giving creditors an equitable lien thereon, and it cannot be released.⁴ And it has been held a shareholder cannot set off his unpaid subscription against a portion of the insurance due him on a loss.⁵ Though it is provided by the charter that a majority of directors only shall make an assessment payable, on the company's insolvency the court may direct it to be paid.⁶ If a portion of the stock is to be paid in cash and the remainder in instalments at the times and on the terms the directors and president shall agree upon, and the subscribers' notes are payable as the directors shall assess, as to the time and amount "to meet the exigencies of the company," it was held the question of exigency could not be raised in the suit to recover on the note.⁷ In England the liability of a liquidating member of a company in respect of calls, where the liquidation proceedings commence prior to the winding up of the company, and are pending at the time of the winding up, is a debt or liability which is not "incapable of being fairly estimated," and which is therefore provable in the liquidation; and when, under these circumstances, a company winding up has failed to carry in a proof in the liquidation proceedings of the member for calls, and he obtains his discharge, he cannot afterwards be placed on the list of contributories.⁸ It is obvious the contract

¹ *Granger L. & Health Ins. Co. v. Co.*, 36 Iowa, 632; *Gill v. Balis*, 72 Mo. Kamper, 73 Ala. 325; *Cunningham v.* 424; *Miller's Ap.*, 11 Ins. L. J. 287 Ins. Co. of N. A., 108 Pa. St. 546. (Pa.); *Sawyer v. Hoag*, 17 Wall. 610;

² *Cunningham v. Ins. Co. of N. A.*, Jenkins v. Armour, 6 Biss. 312 (N. D. 108 Pa. St. 546; *Granger v. L. and* Ill.) See *Palache v. Pacif. Ins. Co.*, 42 Health Ins. Co., 73 Ala. 325. Cal. 418.

³ *Upton v. Jackson*, 4 Ins. L. J. ⁵ *Scammon v. Kimball*, 5 Biss. 431 (N. 189 (Mich.); *Payson v. Withers*, 5 Biss. D. Ill.).

⁴ 269 (Ind.); *Gill v. Balis*, 72 Mo. 424; ⁶ *Upton v. Hansbrough*, 3 Biss. 417 *Payson v. Stoeber*, 2 Ins. L. J. 733 (N. D. Ill.).

(Minn.). ⁷ *Judah v. Amer. Live Stock Ins. Co.*,

⁸ *Sanger v. Upton*, 6 Ins. L. J. 618 4 Ind. 333.

(Ill.); *Melvin v. Lamar Ins. Co.*, 80 Ill. ⁹ *Re Mercant. Mut. M. Ins. Ass'n*, 25

446; *Upton v. Hansbrough*, 5 Chic. L. Ch. D. 415.

N. (Ill.) 242; *Burnham v. Northw. Ins.*

to subscribe to the capital stock, like any other contract, must be supported by a consideration. As, for instance, the right of membership in the corporation, together with all the incidents following therefrom, and if these cannot result from such subscription it is invalid.¹ Therefore, one who had subscribed for shares of stock which, owing to the full amount of stock having been issued, was an illegal subscription, cannot be sued by the assignee of the company for his subscription, though, on the faith of his subscription, he had induced people to insure in the company.²

37. Shares of stock are usually made transferable on the performance of certain formalities. But where the articles of association of a limited company, registered under the English Companies Act of 1862, conferred a power on the directors to issue certificates of shares transferable by delivery (though quere whether this provision was legal), it was held, if it was not legal it would not render the company illegal nor preclude it from being wound up under the order of the court.³ Where shares cannot be transferred except by surrender of the certificate and a transfer on the company's books by the owner or his attorney, the company will render itself liable in damages by negligently transferring without the real owner's assent.⁴ The clause, however, that no transfer shall be made on the books till all debts due the company are paid, may be waived, as it is for the company's benefit,⁵ or possibly for that of a purchaser without notice, but as between the assignor and assignee the transfer will be enforced.⁶

38. The original shareholder is liable for unpaid instalments without an express promise to pay.⁷ But where the original subscriber sells his shares and a new certificate is issued to his purchaser, whose name is entered on the stock book, this carries the implied obligation to pay the unpaid portion of the debt due on the subscription of the original shareholder.⁸ An assignee with the equitable title will be compelled to reimburse the assignor, who

¹ *Granger's L. & Health Ins. Co. v. Kamper*, 73 Ala. 325.

² *Clark v. Turner*, 73 Ga. 1.

³ *Re Gen'l Co. of Promotion of Land Credit*, 5 Ch. Ap. 363.

⁴ *Kempner v. Wallis*, 2 Wil. (Tex.) § 587.

⁵ *Hall v. U. S. Ins. Co.*, 5 Gill (Md.), 484.

⁶ *Kellogg v. Stockwell*, 75 Ill. 68.

⁷ *Upton v. Tribilcock*, 91 U. S. 45.

⁸ *Upton v. Hansbrough*, 3 Biss. 417; (N. D. Ill.); *Hall v. U. S. Ins. Co.*, 5 Gill (Md.), 484.

holds thus the legal title, for any assessments the latter may be compelled to pay.¹

39. Before the recent acts in England, a shareholder was liable *prima facie* to the extent of his fortune, but there would be no legal objection to a shareholder specially contracting with a policyholder for a limitation of liability on the contract to the amount of his shares, though, of course, outside creditors not subscribing to such a contract would not be bound.² Where the policy stated that a certain amount of capital had been subscribed, but contained a clause limiting the shareholder's liability to the amount of his shares, it was held to preclude any enlargement of the shareholder's liability even if the statement as to the amount of capital subscribed were untrue.³ But such a contractual limitation will not give the policyholder a charge on the company's capital or funds before general creditors.⁴

In *Clarke's Case*,⁵ a shareholder of the Albert died in 1867, and, in accordance with the deed of settlement, his executors transferred his share; and in 1869 the Albert went into liquidation. At the time of the transfer there were unpaid debts, viz.: first, on policies and annuities; second, indemnities given in taking the business of other companies; and third, general debts; and it was held, as regards classes 1 and 2, that by the deed the limited liability of a shareholder was up to his shares, and the engagement between the outgoing and incoming shareholder was, that the liability of the outgoing shareholder should be determined both as to debts then present and as to debts afterwards to be incurred, and that the whole liability should be that of the new shareholder in respect of the shares, and therefore the executors need not be put on the list. And as regards class 3, if the estate of the outgoing shareholder was liable for such debts as had accrued before the transfer in an unlimited degree, it was as surety, and the incoming shareholder as principal would be bound to indemnify him; and it would therefore be useless to put the executors on the list of contributors.

¹ *Kellogg v. Stockwell*, 75 Ill. 68. Ass'n, 4 Exch. 525; *Halkett v. Merch.*

² *Hallett v. Dowdall*, 21 L. J. Q. B. Etc., Ins. Ass'n, 13 Q. B. 960.

W. s. 98; *Re Eng. & Ir. Church & University Assur. Soc.*, 1 H. & M. 85; DeG. & J. 660.

Lethbridge v. Adams, L. R. 13 Eq. 547; ⁴ *Re State F. Ins. Co.*, 1 DeG. J. & Robson *v. McCreight*, 25 Beav. 272; S. 634.

Hassell v. Merch. & Traders', Etc., ⁵ *Reilly Alb. Arb.* 223.

In *Re Professional L. Assur. Co.*,¹ the company's deed provided that every shareholder, as between himself and other shareholders, should be liable for the debts of the company in proportion to his share in the company, but *no further or otherwise*, and that the directors should pay a shareholder as any creditor. On winding up, a call was made for unpaid capital, but the proceeds were not sufficient for the debts, and it was held, the shareholders who were creditors were entitled to be paid in full (less calls to be made on their own shares) by means of a further call, and, if any were unable to pay, by still another. For the creditors, other than shareholders, were not restricted, except only policyholders; and the meaning of the clause was that every shareholder who was a creditor must bear his own proportion of a necessary contribution to pay debts, but that otherwise he was to be paid as any creditor.

40. In the United States a shareholder is usually liable for the debts of the company to the full amount of his stock where all has not been paid in.² But, as a general rule, there is no individual liability of a shareholder beyond this, though it has been held the individual responsibility of the shareholder for the debts of the association is not incompatible with the corporate idea,³ and in some corporations shareholders are made individually liable beyond the amount of their shares.⁴

41. The shareholders of a corporation are neither tenants in common nor co-partners in reference to the corporate property, either before or after dissolution; before dissolution, the legal title is in the corporation, and after dissolution, under the statute in its trustees, by the general provisions of the statutes.⁵ A policyholder who is entitled to participate in the profits of a concern is not in any sense necessarily a partner, for the mere right to participate in the profits does not of itself constitute a partnership, as there must be something besides, as, for instance, the relation of agency.⁶ And though regarded as a partner in respect of outsiders, and even

¹ L. R. 3 Eq. 668.

⁴ See also *post*, § 1199.

² See *Morrow v. Superior Court*, 1 W. Coast (Cal.) 114; *Butler v. Walker*, 80 Ill. 345; *Upton v. Hansbrough*, 5 Chic. L. N. (Ill.) 342; *Gulfiver v. Roelle*, 100 Ill. 141; *Hall v. U. S. Ins. Co.*, 5 Gill (Md.), 484.

⁵ *Mickles v. Rochester City Bk.*, 11 Paige (N. Y.), 118.

⁶ *Re Eng. & Ir. Church & University, Etc., Soc.*, 1 H. & M. 85; *Cox v. Hickman*, 8 H. L. C. 268; *Bishop v. Scott*, 7 L. T. T. N. S. 570.

³ *Liv. Ins. Co. v. Mass.*, 10 Wall. 566.

allowed to vote at meetings and entitled to a surplus on a winding up, this is not sufficient to make him a partner as to shareholders, or liable to contribute with them.¹

42. Both in Great Britain and the United States there exist, besides stock companies, companies formed on a mutual plan without shareholders, in which the insured and insurer is each a member of the same organization, and each member is an insurer of all the others; the principal idea of such companies being not so much to make a profit, as to indemnify or pay the insurance when the contingency happens. In England mutual insurance associations, providing that the liability should be only several, are commercial undertakings for the acquisition of gain within the Companies' Act of 1862, and must be registered under it.² These companies are formed on various plans. Sometimes the plan is for the insured to pay a small amount of the premiums in cash, and to secure the balance, which may be necessary for the expenses of the business and for the payment of any losses that may occur, over what is paid in cash, by notes, which are called premium notes, and which are made assessable *pro rata* for this purpose. The premium notes would all bear the same proportion to the amount insured where the hazard is equal, and would be of such an amount as would in the aggregate cover losses which ordinarily might happen. But as an additional safeguard, there is usually a further power to call from the policyholder a certain percentage on the amount insured, besides the full amount of the notes. Another plan is to pay the premiums in cash and have the money realized, over expenses and losses, invested and accumulated, and at certain periods have each policyholder credited with a certain part of the profits realized in proportion to the premium paid by him, the residuary part of the profits remaining as a security for the payment of future losses, and not drawn out till the expiration of the charter or dissolution of the company. Another feature is to allow the company to receive negotiable notes for premiums in advance, from persons intending to take out policies, which are used for the ordinary purposes of business, and a compensation on the excess of the notes over the premiums is allowed the note-makers. This last form of

¹ *Strachan's Case*, 16 Solic. J. 572.

² *Porter on Insurance*, 361.

note is called an advance or stock note.¹ Besides these, there is a great variety of plans more or less similar.²

43. But, generally speaking, there is little or no capital required in cash, and each policyholder entertains a responsibility towards all the others;³ and the assets of the company consist chiefly in the liabilities of members on their notes and accumulations from invested surplus, etc.⁴ It is, however, very common for the legislature to require a certain amount of money by way of capital to be subscribed in advance notes before the company can transact business.⁵ And the requirement that the company shall procure a certain amount before engaging in business, in some of the States applies to foreign as well as domestic companies.⁶ Where there is a specified amount to be subscribed prior to engaging in business, and the corporators are authorized to take applications for insurance and premium notes as a fund or capital to transact business when organized, prior to organization such applications are executory proposals for insurance and for the issue of a policy when the company shall have been organized.⁷ Where an act authorizes the proposed company before final organization to make agreements for a certain amount of insurance and take certain described notes therefor, the act applies

¹ See *Planter's Ins. Co. v. Comfort*, 50 Miss. 662; *White v. Haight*, 16 N. Y. 310; *Sun Mut. Ins. Co. v. Mayor*, 8 Barb. (N. Y.) 450.

² See a peculiar plan in *Mich. Building & Sav. Ass'n v. McDevitt*, 77 Mich. 1, where there was a peculiar co-operative saving association established by statute in Michigan, Act. No. 206, Laws 1877, c. 119, How. Stat., formed to establish frugality. Each member has shares, pays dues, and may sell to the body in advance of its dissolution, which benefits him by getting his profit in advance. In selling to the company he discounts his shares and also pays interest equal to the par value; which discount and interest benefit all, because it is applied equally on all shares and accelerates the company's dissolution, when all periodic payments cease. The seller gets no more than the price, and the shares bought remain on the books to

mark the amount to be credited to each member; but all credits to the seller are received and credited on his obligation to pay the shares subscribed for by him; and hence he ultimately pays less as the general fund is reinforced. He continues a member, unless expelled, till dissolution. After a sale to the company he cannot sell to any one else, for there is no way provided by which he can again become a member, as the share is gone.

³ *Wardle v. Townsend*, 75 Mich. 385; *White v. Haight*, 16 N. Y. 310.

⁴ *Granite State Mut. Aid Ass'n v. Porter*, 58 Vt. 581.

⁵ *Gent v. Mfrs. & Merch. Mut. Ins. Co.*, 107 Ill. 652; *Chesbrough v. Wright*, 51 N. Y. 662.

⁶ *Granite State Mut. Aid Ass'n v. Porter*, 58 Vt. 581.

⁷ *Gent v. Mfrs. & Merch. Mut. Ins. Co.*, 107 Ill. 652.

only to such kinds of notes, and does not impliedly allow the company to take others of a different character before the corporation is finally completed.¹ In a contest as to whether the requisite amount has been raised prior to doing business, the mere absence of an entry on the books of the company does not prove that such a sum has not been collected.²

44. Some companies are formed strictly on a co-operative plan with neither capital, reserve funds, nor accumulations of funds to pay losses, but pay losses by assessments upon their members as the contingency insured against may occur. They are simply based on the mutual agreement of the members of the associations to respond to assessments for the payment of losses in such manner as is provided by the rules of the company or association, and the failure to do this usually operates to cancel the insurance of the member so failing to perform his part of the mutual agreement.³ But the plan pointed out by the charter must be pursued. In Illinois the charter of a company on one of the usual mutual plans was amended so as to do business on the non-participating plan, and business was commenced on a co-operative plan not indicated, each policyholder being charged a member's fee and assessed a fixed sum on a member's death. There was a provision of forfeiture for failure to pay an assessment, and an agreement to make good any deficiencies on the insurer's failure to collect them. But it was held not to be a company contemplated in the charter or amendment, as the policyholders had no voice in the management nor control over the profits; besides, the payments were purely optional and the company a mere machine for collecting assessments.⁴ *Rose v. Gourlay*⁵ is an illustration of the structure of a club or association of underwriters. The members are of two classes, underwriters and brokers, and all the underwriting is done through the brokers, each of whom has a set of underwriters for whom he acts, and, as a rule, they only do business with one another. There is a committee on admissions, and if not satisfied with the financial standing of the applicant they require a guarantee. In this case the policies underwritten do not

¹ *Williams v. Babcock*, 25 Barb. (N. Y.) 109.

² *Nat. Mut. Ins. Co. v. Yeomans*, 8 R. I. 25.

³ *Granite State Mut. Aid Ass'n v. Porter*, 58 Vt. 581.

⁴ *Re Protec'n L. Ins. Co.*, 9 Biss. (N. D. Ill.) 188.

⁵ 16 C. S. C. (4th ser.) 1132.

bear reference to the guarantees, but the policies are accepted on the assumption that the committee is satisfied as to the member's standing or has got a guarantee. The special point that arose in the case was whether the brokers, insuring for their clients, could along with the association enforce such guarantees, or whether the guarantees were merely tests of estimating the member's financial standing, and it was held the guarantee was exacted by the association with a view to enforcement, on account of the insured, and consequently the broker had on behalf of his client a *jus quæsitum* in the guarantee, which gave a title to sue.

45. It is not uncommon to find a company dividing its business into separate branches or classes of risks. It has been held there is nothing in the English Companies' Act of 1862 to preclude the introduction by the articles of two distinct classes of members,¹ as, for example, shareholders and assurance members not holding shares. Subscriptions for insurance in a particular class of risks of a mutual company, made shortly before its vote to adopt the provisions of the statute² allowing a class division, may be considered after the lapse of several years without objection from the company or the persons insured, as a part of the sum required by the statute to make up the amount required to be subscribed, before issuing policies, in an action to recover upon a deposit note of a subsequent member.³

46. Sometimes, besides the fund originally required, the company is authorized to raise an additional fund, termed a guarantee capital.⁴ Irrespective of any express authority in its charter, it was held in Connecticut a mutual company may establish a guarantee fund for the purpose of giving itself credit and of inducing persons to take out policies.⁵ Though in New Jersey it was held that the fund authorized by the charter was the only fund liable for debts, and that a guarantee fund raised by bonds and mortgages, to the subscribers of which was paid out of the company's earnings six per cent. on the amount of their contribution, was beyond the charter and could not be

¹ Winston's Case, 12 Ch. D. 239.
See Bath's Case, 8 Ch. D. 334.

⁴ Traders' & Meehan. Ins. Co. v. Brown, 142 Mass. 403.

² Act of 1849, c. 104, § 2, Mass.

⁵ Hope Mut. L. Ins. Co. v. Weed, 23

³ Cit. Mut. F. Ins. Co. v. Sortwell, 8 Conn. 51; Hope Mut. L. Ins. Co. v. Allen (Mass.), 217. Perkins, 38 N. Y. 404.

enforced from the subscribers to pay the debts of the company.¹ In any event the creation and disposal of such a fund, if valid, would depend on the statute or on the contract creating it.² Thus, where a mutual company in Massachusetts, incorporated in 1848, subject to the provisions of the Rev. Stat. c. 37, was authorized subsequently, on receiving a guarantee capital from subscribers, to make insurance "otherwise than on the mutual principle," though subject to these and all subsequent statutes as to insurance; that of 1856,³ directing that all business done by each department should be kept separate, and passed by-laws treating funds arising from both departments as one, though the business of each was kept separate; and later having a large surplus from the stock department the company voted to discontinue the stock department and to redeem the guarantee fund, it was held on a bill against the shareholders of the guarantee fund by the company, that the by-laws were void, the funds had rightly been kept separate, and that the shareholders of the guarantee capital were entitled to such surplus.⁴ In *Pendergast v. Commer. Mut. Mar. Ins. Co.*,⁵ the members agreed "to pay the said company on demand the sums set opposite their respective names, or such parts thereof as may from time to time be called in for the use of the said company, the same to be payable either in money or notes." The subscription was not to be assessed, but was to be retained as a guarantee fund, but the subscribers were to have the privilege of giving stock notes payable in advance of premiums, as should seem judicious to the directors, to be repaid in premiums, and all such sums should be in full, to the extent paid, of all liability on the subscription, and it was held the agreement created only a contingent liability on the part of the subscribers, as there was an implied implication by the company to issue policies and thus enable the subscribers to discharge their liability on the subscription, and that on its insolvency its inability to perform its part absolved the subscribers from liability either to the corporation or its creditors. In *Russell v. Bristol*,⁶ on the insurance commissioner

¹ *Trenton Mut. L. & F. Ins. Co. v. McKelway*, 1 Beas. Ch. (N. J.) 133.

² C. 252, § 36.

³ See *Britton v. Supreme Council*, 46 N. J. Eq. 102; *Re Home Provident Safety Fund Ass'n*, 129 N. Y. 288; *Re Equit. Reserve Fund L. Ass'n*, 131 Ib. 354.

⁴ *Duff v. Can. Mut. Ins. Co.*, 6 Ont. Ap. 238.

⁵ 15 Gray (Mass.), 257.

⁶ 50 Conn. 221.

declaring a deficiency of assets, a guarantee capital was subscribed under an agreement which provided that the subscribers should transfer securities to the amount of their subscriptions to the company, the income of which should be paid to them, and the company was to pay interest for their use, and if not used the securities were to be returned in three years. A. subscribed \$10,000, transferring the necessary security, which, on his subsequent death at the expiration of three years, was retransferred to his estate. The company afterwards becoming insolvent, brought upon suit by the receiver for the \$10,000 and the security from A.'s executor, the court held A.'s obligation was not paid by the transfer of the security originally to the company, but only secured, and the right of action accrued when the demand was made by the receiver. When the charter prescribes the accumulation of a fund for a class of beneficiaries, and a subsequent act enlarged its scope, giving the body the right to establish a fund for others, this does not help one outside the original class if an additional fund has not been accumulated under the new act.¹ Where certain leading members of a company agreed to give their notes respectively payable in a year, receiving a commission of six per cent. on their amount so long as the company should hold the security, it was held an assessment thereon after the company's regular assets were exhausted could be made on the whole note without allowing the member a deduction for commission, but that he should look to the company like any other creditor for his commission.² A co-operative company even does not necessarily lose its character by the presence of a guarantee fund, created, not for the payment of losses, but simply as a guarantee of the payment of assessments.³ A beneficial society usually is substantially an insurance company, and its certificates in legal contemplation policies of insurance, and in most respects is governed by the general rules which apply to insurance contracts, unless other rules owing to the peculiarity of the individual charter happen to make a difference.⁴

¹ *Britton v. Supreme Council*, 46 N. J. Eq. 102.

² *State v. Bankers' & Merch. Mut. Ben. Ass'n*, 23 Kan. 499.

³ *Hope Mut. L. Ins. Co. v. Weed*, 28 Conn. 51; see also *Re Cal. Mut. L. Ins. Co.*, 81 Cal. 364; *Burdon v. Mass. Safety Fund Ass'n*, 147 Mass. 360.

⁴ *Presbyterian Assur. Fund v. Allen*, 7 N. East. R. (Ind.) 317.

47. It has been often said that the members of a mutual insurance company become associated together in a manner partaking of the nature of limited or special partners.¹ But neither a mutual nor co-operative company is technically a partnership,² and the liability of their members is not joint and several, but the principle is that each one contracts that, in respect of a certain sum or premium to be levied by a *pro rata* contribution on the amount for which he himself is insured, he will contribute to pay the contingency insured against which may occur to any other member; but there is no participation by any member in respect of the liability of any other in regard to solvency, default, or dishonesty.³ Nor is a beneficial society a partnership,⁴ but it is governed rather by the rules applicable to a club, and the authority of its officers and committee depends on its constitution and rules. Thus where the object of a company is benevolent, and some of the members contract for objects outside the charter, as to build and purchase land for a temple, those members only were held bound who acquiesced, but the rest would not be bound as partners.⁵ And though the individual members of a benevolent voluntary unincorporated association may become responsible to outsiders, they would not, *inter se*, beyond the limit of their own agreement.⁶ There is no trust relation between a policyholder in a mutual company and the company; therefore, it has been held a suit in equity cannot be sustained upon that theory.⁷ But a mutual company cannot contract with one policyholder on a different plan from the others as to the premium.⁸

48. The principle of mutuality may exist whether the persons constituting the company contribute either cash or assessable premium notes.⁹ In *Mygatt v. N. Y. Protec. Ins. Co.*,¹⁰ where a

¹ *Krugh v. Lycom. F. Ins. Co.*, 77 Pa. St. 15.

² *Cohen v. N. Y. Mut. L. Ins. Co.*, 50 N. Y. 610.

³ See *Redway v. Sweeting*, L. R. 2 Exch. 400; *Re Lond. M. Ins. Ass'n*, 8 Eq. Cas. 176.

⁴ *Brown v. Stoerkel*, 74 Mich. 269.

⁵ *Ash v. Guie*, 10 Ins. L. J. (Pa.) 807.

⁶ *Kuhl v. Meyers*, 35 Mo. Ap. 206. See *Re Lond. M. Ins. Ass'n*, 8 Eq. Cas. 176.

⁷ *Taylor v. Charter Oak L. Ins. Co.*, 59 How. Pr. (N. Y.) 468.

⁸ *Glevenger v. Mut. L. Ins. Co.*, 2 Dak. 114.

⁹ See *Spruance v. Farmers' & Merch. Ins. Co.*, 9 Colo. 73; *Ill. F. Ins. Co. v. Stanton*, 57 Ill. 354; *State v. Mfrs. Mut. F. Ins. Co.*, 8 West. R. 258 (Mo.); *White v. Haight*, 16 N. Y. 310; *Mygatt v. N. Y. Protec'n Co.*, 21 N. Y. 52; *Ohio Mut. Ins. Co. v. Marietta Woolen Factory*, 3 Oh. St. 348; *Un. Ins. Co. v. Hoge*, 21 How. 35.

¹⁰ 21 N. Y. 52.

company was organized under the general act to insure on the mutual plan, it was held to have power to issue policies upon the payment of a fixed premium without provision for any contingent liability of the insured. In *Rundle v. Kennan*,¹ the statute under which a mutual company was organized did not allow a cash premium, as is usual in stock companies, yet the court held, as all the property insured was liable to assessment and all the insured were members, that the issue of a policy for a premium in cash was not an *ultra vires* contract. Not infrequently the stock and mutual plan are combined. Where the charter provided the company should insure on the mutual or cash plan, and authorized the issue of stock, and the by-laws provided it should be only a mutual company and no stock issued, it was held the company could not be dissolved on account of its failure to issue stock, as it was a mutual company.² And where a company authorized to do business on the stock and mutual principle was ordered on a suggestion of insufficient assets to have its shareholders pay a certain sum of money and a per cent. on stock into the treasury, instead of which securities were taken, it was held, though not a compliance with the order, that the company might insure on the mutual plan alone, which did not need the money or stock to be paid up.³ Where a charter of a mutual insurance company was amended, incorporating it as a stock company, it was held that the amendment made it one body, and the revocation of the amended charter would amend both.⁴

49. It was held in Illinois, where the charter permitted a mutual company to receive premiums in money and take risks in the same manner as a stock company, that one insuring and paying the premium in cash will not be held a "member" of the company.⁵ And the word "member," as used in the provision of the New York Act of 1853, section 107, allowing the company to sue any of its members or shareholders, and "members or shareholders" to sue it, means the same as shareholders, and does not apply to policyholders who were not necessarily members of the company.⁶ Where the articles of association of an English unlimited insurance society provided

¹ 79 Wis. 492.

⁴ *Com'th v. Mfrs. Ins. Co.*, 2 Ib. 426.

² *Com'th v. Merch. & Mechan. Ins. Co.*, 2 Pear. (Pa.) 428.

⁵ *Ill. F. Ins. Co. v. Stanton*, 57 Ill. 354.

³ *Com'th v. Kittanning Ins. Co.*, 2 Ib. 430.

⁶ *People v. Security L. & Annuity Co.*, 78 N. Y. 114.

that there should be two classes, shareholders and assurance members who were policyholders, and who participated in the profits, and that when the shareholders should be paid off under the scheme the company should consist of the members only, the shareholders in the meantime to have 6 per cent. on their paid up-calls, and every third year one-fourth of the profits the other three-fourths being carried to the assurance fund and appropriated by way of a bonus to the policies of the participating policyholders who had paid premiums for five years, it was held on the company being wound up before the shareholders had been paid off that the participating policyholders were contributing members, but that they could not be called on to contribute till the shareholders had been exhausted; and as the assured members did not directly participate in the profits the presumption of law, that in the absence of express stipulation partners must share losses in the same proportion as they share profits, did not apply.¹

50. An applicant for insurance becomes a member of a mutual company when the contract of insurance is completed.² Where the articles of association provided that no one should be registered till he should have signed an agreement to become a member, and that payment of a premium entitled a registered policyholder to become a member, and the applicant had signed a proposal which was to be the basis of a policy, and thereby agreed to execute the articles of association when required, and the policy recited the proposal and that the applicant had agreed to become a member on the basis of the contract, and that the policy was subject to the articles of association, and the premiums were paid, it was held that by signing the proposal which engrafted the articles of association, and by paying premiums, the applicant had acceded to the articles and become a member, and that the court could rectify the omission of her name on the register.³ Where the plaintiff sent in an application and paid a premium before the formal organization of the company, but was one of the number requisite to begin business, and at a later meeting

¹ *Albion L. Assur. Soc.*, 16 Ch. D. 83. *hanna Mut. F. Ins. Co.*, 14 Ins. L. J. 913 (Pa.); *Eilenberger v. Protective*

² *Mut. B. Ins. Co. v. Miller Lodge*, *Mut. F. Ins. Co.*, 89 Pa. St. 464. Etc., *Odd Fellows*, 58 Md. 463; *Cum-*

berland Val. Mut. Protec. Co. v. Schell, *D. 83.* ³ *Re Albion L. Assur. Soc.*, 16 Ch. 29 Pa. St. 31; *Nassauer v. Susque-*

it was resolved that as the requisite number of applications had been had the company should now issue policies, and that "applications for insurance or for any change in the policy of insurance in all cases shall be passed upon and approved or rejected by at least two directors" etc., it was held, a loss occurring the next day after the meeting, that the applicant was a member, because the by-law must either be considered as waived or else that the applicant had been a member before the by-law was passed; for as his application was a necessity to the completion of the organization, he would with other members have been liable for a loss on any policy, and therefore he must also be entitled to recover on a loss.¹

51. When a member is about to join a mutual company it has been more than once held that, though he is presumed to know the general nature and structure of the body he is about to enter,² yet pending the negotiations prior to the completion of the contract he will not be bound by the rules or by-laws of the body which apply to the formation of the contract, unless brought to his notice, but that up to the completion of the contracts he acts merely as a stranger.³

52. After the contract's completion the member is certainly bound by any valid by-law which may exist, and will be held to have implied knowledge of its terms.⁴ It has been suggested that

¹ Van Slyke v. Trempealeau Co. Farmers' Mut. F. Ins. Co., 48 Wis. 683.

² Van Buren v. St. Joseph Co. Village F. Ins. Co., 28 Mich. 398; Wardle v. Townsend, 75 Ib. 385; Van Loan v. Farmers' Mut. F. Ins. Co., 90 N. Y. 280; Susquehanna Ins. Co. v. Perrine, 7 W. & S. (Pa.) 348.

³ Cumberland Val. Mut. Protec. Co. v. Schell, 29 Pa. St. 31; Nassauer v. Susquehanna Mut. F. Ins. Co., 14 Ins. L. J. (Pa.) 213; Eilenberger v. Protective Mut. F. Ins. Co., 89 Pa. St. 464; Smith v. Ins. Co., 24 Ib. 320; Mut. Acc. & L. Ass'n v. Kayser, 14 W. N. C. (Pa.) 86. It was held in Susquehanna Ins. Co. v. Perrine, *supra*, where it was provided by the act of incorporation that a party insured *ipso facto* becomes a member, he will be bound by a by-law as to

a false survey, and that the agent making the survey should be agent of the insured; since the insured was bound to know the rules of the company he was about to join; but this case can scarcely be considered as law in Pennsylvania now.

⁴ See Lattomus v. Farmers' Mut. F. Ins. Co., 3 Hous. (Del.) 404; Protec. L. Ins. Co. v. Foote, 79 Ill. 361; Covenant Mut. L. Ben. Ass'n v. Spies, 114 Ib. 463; Ill. Mut. F. Ins. Co. v. Marseilles Mfg Co., 1 Gil. (Ill.) 236; Bauer v. Samson Lodge, 102 Ind. 262; Pfister v. Gerwig, 122 Ib. 567; Holland v. Taylor, 111 Ib. 121; Simeral v. Dubuque Mut. F. Ins. Co., 18 Iowa, 319; Coles v. Iowa State Mut. Ins. Co., 18 Ib. 425; Walsh v. Aetna L. Ins. Co., 30 Ib. 133; Miller v. Hillsborough F. Assur. Ass'n, 42 N. J.

while a member in a mutual company is bound to know the rules, this must not be understood as relating to mere regulations adopted by the officers of the company in regard to the transaction of business, directions to agents, and the like, but rather to such rules as enter into the charter or by-laws of the company whereby the right and liability of its members are fixed.¹

53. It is obvious that a by-law must be valid to bind the members. Where the charter confers the power to pass by-laws excluding any member from its benefits for failure to pay interest on his note, a by-law prescribing the form of a policy which contained a stipulation for suspension on a default is a proper exercise of such a power.² The constitution obviously must govern when there is a conflict between it and the by-law.³ Where the company has construed its own charter in its certificate of membership and its by-laws, it has been held it cannot afterwards set up against a member that such construction was wrong.⁴ The beneficiary under a policy is bound by the by-laws and contract of the insured with the association as well as the insured.⁵

54. Though bound by by-laws existing at the formation of the contract, and by all reasonable regulations which the company may thereafter pass as to its government,⁶ the insured is not bound by by-laws passed subsequently to his membership the effect of which is to modify or change the contract of insurance and to which he has not assented.⁷ Nor will the insured's assent be implied to a by-law

Eq. 459; *Belleville Mut. Ins. Co. v. Van Winkle*, 1 Beas. (N. J.) 333; *Woodfin v. Asheville Mut. L. Ins. Co.*, 6 Jones (N. C.) 558; *Boyle v. N. C. Mut. F. Ins. Co.*, 7 Ib. 373; *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Pa. St. 402; *Burger v. Farmers' Mut. Ins. Co.*, 71 Ib. 422; *Supreme Lodge, Etc., v. Grace*, 60 Tex. 569; *Splawn v. Chew*, 60 Ib. 532. See also *Willcutts v. Northw. Mut. L. Ins. Co.*, 81 Ind. 300; *Van Buren v. St. Joseph Co. Village F. Ins. Co.*, 28 Mich. 398; *Coleman v. Supreme Lodge*, 14 Ins. L. J. (Mo.) 635; *Redstrake v. Cumberland Mut. F. Ins. Co.*, 44 N. J. L. 294.

¹ *Walsh v. Aetna L. Ins. Co.*, 30 Iowa, 133.

² *Webb v. Mut. F. Ins. Co.*, 63 Md. 213.

³ *Sherry v. Operative Plasterers' Mut. Un.*, 20 Atlan. R. (Pa.) 1062.

⁴ *Ky. Mut. L. Ins. Co. v. Calvert*, 9 Ins. L. J. (Ky.) 529.

⁵ *Gray v. Supreme Lodge*, 118 Ind. 293.

⁶ *Ga. Mason. Mut. L. Ins. Co. v. Gibson*, 52 Ga. 640; *Streit v. Cit. F. Ins. Co.*, 29 N. J. Eq. 21.

⁷ See *Supreme Commandery v. Ainsworth*, 71 Ala. 436; *Becker v. Farmers' Mut. F. Ins. Co.*, 48 Mich. 610; *Stewart v. Lee Mut. F. Ins. Ass'n*, 64 Miss. 499; *Cox v. Farmers' Mut. F. Assur. Ass'n*, 3 Atlan. R. (N. J.) 122; *Ins. Co. v. Coonor*, 17 Pa. St. 136; *Rosenberger v.*

inconsistent with the charter.¹ But where the insured member, either expressly or impliedly contracts to be bound by future by-laws not in existence at the time of the contract, a subsequent by-law will bind him.² In like manner it has been held that a rule benefiting the insured which was not contractual may at any time be abrogated by the corporation.³

55. The statute or letters patent contain the powers that can be exercised by an incorporated company, and therefore the company can only make those contracts which are therein expressly or impliedly permitted.⁴ But a policy against fire issued by a mutual company is not necessarily void because by its terms it extends beyond the time limited by the charter for the company's corporate existence, for the loss might happen within the prescribed period.⁵

56. It was held in *Western v. Genesee Mut. Ins. Co.*,⁶ that a company incorporated in the State of New York and authorized to insure the property of all persons who may become members, may make contracts of insurance in that State with Canadians as to their personalty in Canada. It has been contended that a policy on a chattel in a mutual company issued to a plaintiff who had no interest in it, but who was authorized to insure it for the owners, "for whom it may concern," was void, because the company being mutual, the insurance could only be to persons interested, though there was no such clause in the charter or by-laws, but it was held even if there had been, the owner's sanction of the contract would make it valid.⁷

57. Only such perils as the charter contemplates can be insured against. Thus, an authority to insure against the risks attending an inland voyage does not necessarily include a foreign or sea-voy-

Wash. F. Ins. Co., 87 Ib. 207; 1819; 315; Korn v. Mut. Assur. Soc., 6
Bradfield v. Un. Mut. Ins. Co., 9 W. N. Cranch, 192.

C. (Pa.) 436; Morrison v. Wis. Odd ³ Ir. Catholic Benev. Ass'n, 11 Ins. L.
Fellows' Mut. L. Ins. Co., 59 Wis. 162. J. 307 (Ind.).

¹ Great Falls Mut. F. Ins. Co. v. Harvey, 45 (N. H.), 292.

² See *Supreme Commandery v. Ainsworth*, 71 Ala. 436; *Supreme Lodge v. Knight*, 117 Ind. 489; *Bogards v. Farmers' Mut. Ins. Co.*, 79 Mich. 440; *Currie v. Mut. Assur. Soc.*, 4 H. & M. (Va.)

⁴ *Froehly v. N. St. Louis Mut. Ins. Co.*, 32 Mo. Ap. 302; *Molson v. Com'd Assur. Mut.*, 13 Rev. Leg. (Can.) 392.

⁵ *Huntley v. Merrill*, 32 Barb. (N. Y.) 626.

⁶ 12 N. Y. 258.

⁷ *Cobb v. New Eng. Mut. M. Ins. Co.*, 6 Gray (Mass.), 192.

age.¹ *In re Phoenix L. Assur. Co.*,² the deed of the company described it as a life company, but at a meeting marine risks were resolved on, which fact was mentioned in the annual returns to the registry office and in reports and circulars, and on one occasion this information was sent with a dividend warrant. A deed for marine business was executed by certain shareholders, though none appeared to object; on a winding up after a year and a half of marine business, all the shareholders not having voted for it, it was held that there had not been a sufficient acquiescence as to the extension of the business to marine risks. *In re Norwich Provident Ins. Soc.*,³ the company was organized under the Joint Stock Companies' Act,⁴ and the deed of settlement, after providing particularly for a great many incidents of life, accident, and health insurance, empowered the company "generally to make and effect insurances against all and every kind of risk, special or general, which may be effected according to law," which was held to include fire risks. Where the charter authorizes only insurance against fire, a by-law recognizing damages by lightning imposes no obligation on the company to pay for any loss through the latter agency.⁵ So a company authorized to insure buildings and personalty against fire, lightning, and transportation cannot insure against accident or disease resulting to horses.⁶

58. A Kansas mutual company, organized under the Act of 1885, c. 132, which does not possess any guarantee fund, cannot issue policies outside the State.⁷ A company forbidden to do business "in more than three counties in this State, which counties shall be named and set forth in their charter," cannot issue a policy outside this limit.⁸ Sometimes mutual companies are confined to towns and villages.⁹

¹ *Webster v. Buffalo Ins. Co.*, 7 Fed. R. 399 (E. D. Mo.).

² 2 J. & H. 441.

³ 37 L. T. n. s. 273.

⁴ 7 & 8 Vict., c. 110; 10 & 11 Vict. c. 78.

⁵ *Andrews v. Un. Mut. F. Ins. Co.*, 37 Me. 256.

⁶ *Rochester Ins. Co. v. Martin*, 13 Minn. 59.

⁷ *Kan. Home Ins. Co. v. Wilder*, 43 Kan. 731.

⁸ *Eddy v. Merch., Mfr's & Cit. Mut. F. Ins. Co.*, 72 Mich. 651, organized under Mich. Laws 1873, sec. 4249, sec. 3.

⁹ *Wardle v. Cummings*, 86 Mich. 395.

59. Where the charter authorized insurance by members on "their dwelling-houses," giving a lien on the buildings to secure assessments, a policy on a dwelling owned by a husband on his wife's land would be bad, because not his dwelling, and no lien could exist on it in the company's favor.¹ But though the principal object of a company may be to contract in a mutual manner, and to make the premium notes liens on realty, the right to insure "any kind of property" must certainly include personalty.² Where the charter only authorizes an insurance provided the insured has a fee simple unencumbered, and not a less estate, etc., a policy to one on his encumbered realty is bad.³ Where the charter restricts insurances to owners or mortgagees of realty, a husband's right of "homestead," if any, in buildings he insures before conveying them to his wife, would not be insurable.⁴

If a "town" insurance company, without a majority vote of the members, cannot insure a school-house, a policy on a dwelling-house becomes void when changed to a school-house without such vote.⁵ And a prohibition as to a school-house means a building used for school purposes, though not necessarily a District school-house.⁶ The authority to insure farm buildings does not cover an incubator, situated on half of an acre, and used solely to hatch chickens by artificial means.⁷ The power to insure "hay, grain, and other agricultural products in barns, stacks, or otherwise against fire and 'storms and hurricanes' covers 'growing crops.'"⁸ A by-law prohibiting an insurance in excess of two-thirds of the estimated value of property has been considered not as intended to be a condition in the contract, but rather as a direction to the officers in making insurances.⁹

¹ *Froehly v. North St. Louis Mut. Ins. Co.*, 32 Mo. Ap. 302.

⁵ *Luthe v. Farmers' Mut. F. Ins. Co.*, 55 Wis. 543.

² *Allen v. Mut. F. Ins. Co.*, 2 Md. 111. See *Mut. F. Ins. Co. v. Deale*, 18 Md. 26.

⁶ *Luthe v. Farmers' Mut. F. Ins. Co.*, 55 Wis. 543.

³ *Leonard v. Amer. Ins. Co.*, 97 Ind. 299; *De Lancey v. Ins. Co.*, 52 N. H. 581; *Mut. Assur. Co. v. Mahon*, 5 Call (Va.), 517; *Mut. Co. v. Holt*, 29 Grat. (Va.) 612.

⁷ *O'Neill v. Pleasant Prairie Mut. F. Ins. Co.*, 71 Wis. 621.

⁴ *Glaze v. Three Rivers, Etc., Ins. Co.*, 87 Mich. 349.

⁸ *Mut. F. Ins. Co. v. Dehaven*, 5 Atlan. R. 65 (Pa.).

⁹ *Cumberland Valley Mut. Prot. Co. v. Schell*, 29 Pa. St. 31.

60. Very frequently the statute law and charters of beneficial societies point out special classes of people as beneficiaries, and when this is done an insurance for a beneficiary outside the class is invalid. Thus where the object of the society is to provide insurance for the widows, children, and dependents of the insured, the insurance cannot go beyond this class.¹ The use of the word "family" in respect of such a company has been held to mean wife, children, etc.² In Pennsylvania, where the charter expressed the object to be for a "widow or orphan," a designation of a sister was held good.³ When provisions of limitation as to beneficiaries analogous to the above exist, the issue of an ordinary policy payable to the insured's executor, etc., is bad;⁴ and it has been held that in such an organization a member could not designate his "estate" as beneficiary, as in that event creditors might take.⁵ Though a policy "for the benefit of the 'estate' of the insured" was held in Florida to mean his family, where there was nothing to show affirmatively it was not so intended; on the ground, it will be presumed that the policy was made with reference to an Act, in existence when the contract was made, which directed an insurance by one for his wife and children to be paid to them in equal portions, free from the claims of creditors; and parol evidence was admitted to show the insured had no creditors at the issue of the policy, and that the words of the policy were intended to apply to persons, not things.⁶ A body to give "financial aid and benefit to widows, orphans, and heirs or devisees of the deceased members" cannot issue an endowment certificate payable at a certain age.⁷ And an agreement that mortuary assessments shall form a guarantee on a Tontine plan, known as "Tontine Reserve Fund," and that a member shall draw out his share at the end of a Tontine period, is illegal under the provision that the mortuary fund should

¹ See *Palmer v. Welch*, 132 Ill. 141; *Van Bibber v. Van Bibber*, 82 Ky. 347; *Duvall v. Goodson*, 79 Ky. 224; Ky. *Masonic Mut. L. Ins. Co. v. Miller*, 13 Bush. (Ky.) 489; *Daniels v. Pratt*, 143 Mass. 216; *Supreme Council v. Smith*, 45 N. J. Eq. 466; *Britton v. Supreme Council*, 46 Ib. 102; *State v. Central Oh. Mut. Relief Ass'n*, 29 Oh. St. 399; *State v. Standard L. Ass'n*, 38 Oh. St. 281. See also *Golden Rule v. People*, 118 Ill. 492.

² *Britton v. Supreme Council*, *supra*.

³ *Maneely v. Knights of Birmingham*, 115 Pa. St. 305. See *Supreme Lodge v. Martin*, 12 Ins. L. J. 628 (Pa.).

⁴ *Kelsall v. Tyler*, 11 Exch. 513; *State v. Standard L. Ass'n*, 38 Oh. St. 281.

⁵ *Daniels v. Pratt*, 143 Mass. 216. See also *Stoelker v. Thornton*, 88 Ala. 240.

⁶ *Pace v. Pace*, 19 Fla. 438.

⁷ *Rockhold v. Canton Mason., Etc., Soc.*, 129 Ill. 440.

be used only to pay death losses.¹ If the company is forbidden to admit any one under ten or over seventy, it may take minors over ten who advance their charges.² But a co-operative company organized under the laws of New York of 1883, c. 175, cannot insure the lives of infants, as the members must be *sui juris*.³ But under the Massachusetts Act of 1885, c. 183, a member of a beneficial association may insure for his own benefit, so that the money will go to his estate.⁴ Where the insured is empowered to appoint the benefit to a special class of relatives, "or as he shall direct," "or to his devisees," or some such words, this has been held to authorize the appointment to a stranger.⁵ Where the object was to "secure the family or heirs of any member" and the certificate read to "A. B. (the wife), heirs, administrators, or assigns" and the parties had no children, the heirs of the husband were allowed to take as if he was the member.⁶ A certificate of a Massachusetts company organized under the Revised Statutes 3630, "for the purpose of mutual protection and relief of its members," and for payment of stipulated sums of money to the "families or heirs of deceased members," which were made payable to the insured member or to "any person designated by his will or his heirs, if no person is designated therein, or by will," etc., would not go to a stranger in blood.⁷ Where a son designates his lodge as beneficiary, it has been held that his father cannot attack the legal existence of the lodge, or its capacity to take.⁸

61. Apparently the limitation of the statute existing at the formation of the contract governs the member's right to appoint, and a subsequent statute enlarging such right is immaterial.⁹

62. It has been held, a company is bound by a contract *ultra*

¹ Chicago Mut. L. Indemnity Ass'n v. (Ky.); Daniels v. Pratt, 143 Mass. 216; Hunt, 127 Ill. 257. Massey v. Mut. Relief Soc., 7 N. East.

² Ib. R. 619 (N. Y.); Lamont v. Grand

³ Re Globe Mut. Benef. Ass'n, 63 Lodge, 31 Fed. R. 177 (N. D. Iowa). Hun (N. Y.), 263, see § ante, 15.

⁴ Harding v. Littlehale, 150 Mass. 76 Mich. 146.

⁵ Nat. Mut. Aid Ass'n v. Gonser, 43

⁶ See Stoelker v. Thornton, 88 Ala. Oh. St. 1.

⁷ 240; Bloomington Mut. Benef. Ass'n v. Blue, 120 Ill. 121; Mitchell v. Grand Brakemen, 46 Minn. 303.

⁸ Lodge, 70 Iowa, 360; Adams v. Nat. Supreme Council v. Perry, 5 N. Mut. Benef. Ass'n, 11 Ins. L. J. 710 East R. 634 (Mass.).

vires after part performance;¹ but the contrary has also been held.² Where the insurer voluntarily insures beyond the amount allowed by the charter, it has been held the policy is valid up to the amount permitted.³ But it has been held that in a mutual company the insurer, after part performance, is certainly not estopped from setting up the plea of *ultra vires* against a member who is bound by the charter;⁴ nor is the member, the maker of a premium note, estopped on his side from setting up the plea of *ultra vires* in a suit on the note.⁵ But if a member object that the certificate he gets in a suit on it is *ultra vires*, he destroys his own case, for then there would be no contract at all; for the question would be, not the company's powers, but what it did; if it could not make the contract sued on, then none existed; part of the certificate cannot be *infra vires* and part *ultra vires*.⁶

63. A member cannot set up that the by-laws under which he acquires membership are invalid.⁷ It has been held that after part performance and profit the insured is bound in a suit on his note.⁸ The validity of the company's existence cannot, it has been held, be set up by a member of the corporation.⁹ It has been held, a member of a body may show it is a corporation *de facto*, that it contracted as such, and has a recognized existence as a legal entity with a capacity to contract.¹⁰

64. A word may be said about the power of a corporation to borrow or invest money. It may be stated that, besides the powers expressly granted, corporations are assumed to have such incidental powers as are necessary for the purpose of carrying into

¹ *Bloomington Mut. Benef. Ass'n v. Blue*, 120 Ill. 121; *Denver F. Ins. Co. v. McClelland*, 9 Pac. R. 771 (Colo.). See also *Russell v. Detroit Mut. F. Ins. Co.*, 80 Mich. 407; *Hoge v. Dwelling-House Ins. Co.*, 138 Pa. St. 66.

² *Webster v. Buffalo Ins. Co.*, 7 Fed. Rep. 399 (E. D. Mo.).

³ *Williams v. New Eng. Mut. F. Ins. Co.*, 31 Me. 219.

⁴ *Leonard v. Amer. Ins. Co.*, 97 Ind. 299.

⁵ *Rochester Ins. Co. v. Martin*, 13 Minn. 59. See *Webster v. Buffalo Ins. Co.*, 7 Fed. R. 399 (E. D. Mo.).

⁶ *Palmer v. Commer. Travellers' Mut. Acc. Ass'n*, 53 Hun. (N. Y.) 601.

⁷ *Pfister v. Gerwig*, 122 Ind. 567.

⁸ *Hill v. Reed*, 16 Barb. (N. Y.) 280. See *Lycorn. F. Ins. Co. v. Laufer*, 4 Leg. Gaz. (Pa.) 153.

⁹ See *Traders' Mut. Ins. Co. v. Stone*, 9 Allen (Mass.), 483; *Nashua F. Ins. Co. v. Moore*, 55 N. H. 48; *Jones v. Dana*, 24 Barb. (N. Y.) 395; *White v. Coventry*, 29 Ib. 305; *White v. Ross*, 4 Abb. Dec. (N. Y.) 589; *Cooper v. Shaver*, 41 Barb. (N. Y.) 151.

¹⁰ *Jewell v. Grand Lodge*, 41 Minn. 405.

effect those powers actually conferred.¹ Insurance companies, in the general conduct of their business, may take and hold negotiable notes and securities, and necessarily may negotiate them;² though it may be shown that they were given for a purpose not authorized, and if so, then void.³ The mere fact that a company takes notes instead of "money" on a loan to meet liabilities is not material.⁴ Where the company is authorized to loan to individuals or public corporations on real or personal security, but is prohibited from using its funds in "the trade or business of exchange or money brokers," it may purchase a bill of exchange, drawn on and accepted by third persons, to collect a previous debt due, or as an investment; but it may be shown to have been taken for an improper purpose.⁵ But a company authorized by its charter to invest its funds as deemed best by its directors has not power to purchase on credit the promissory note of one insured by the company and entitled to indemnity for a loss, for the purpose of setting off such note against the claim.⁶ It was held in Indiana that a life and accident company can mortgage its realty as a security to borrow money, and that after the money is spent and it is insolvent, neither its policyholders nor corporators can set up that the objects on which the money was spent were *ultra vires*, nor even the lender, although he knew the objects to be *ultra vires*, but was not in any way an accomplice.⁷ Where insurance companies are permitted to hold land purchased at sales under judgments obtained on mortgages, provided the same should be sold within five years, unless the certificate of the comptroller should be procured allowing a longer possession, the failure to obtain the certificate does not divest the company's title or suspend its power of sale after that time, if the act imposed no penalty for its violation.⁸ And where the charter of a life insurance company provided that its "capital stock and funds shall be invested either in loans upon bonds and mortgages upon real estate of double the value of the debt secured, or

¹ Wright v. Hughes, 119 Ind. 324; ⁵ White's Bk. v. Toledo F. and Mut. Straus v. Eagle Ins. Co., 5 Oh. St. 59. Ins. Co., 12 Oh. St. 601.

² Alexander v. Horner, 1 McCrary, ⁶ Straus v. Eagle Ins. Co., 5 Oh. St. 634 (E. D. Ark.). 59.

³ Straus v. Eagle Ins. Co., 5 Oh. St. ⁷ Wright v. Hughes, 119 Ind. 324. 59. ⁸ Home Ins. Co. v. Head, 30 Hun

⁴ Holbrook v. Bassett, 5 Bos. (N. Y.) (N. Y.), 405. 147.

in loans upon or purchase of United States stocks and bonds, bank stocks, or stocks and bonds issued by any of the States of this Union, or by municipal or other corporations," a mortgage duly made to the company upon land in Ohio, securing a promissory note given in consideration of a loan of its funds by the company, has been held valid.¹ The power of fire and marine companies, organized in Missouri under the Act of 1855,² to loan money on personal security, is retained in the Act of 1869.³

65. There can be no doubt of the power of States to legislate upon and control to a certain extent the method of carrying on the business of insurance within their limits, whether the policy of doing so be wise or not.⁴ For example, in Illinois, under the General Insurance Law of 1869, an insurance company has no authority to begin business until it obtains from the auditor of public accounts a certified copy of its charter and the certificates required to be filed with him, and besides shall have filed them in the office of the proper county clerk for record.⁵ In Missouri it is made a misdemeanor for the companies not to furnish the State superintendent of insurance with information touching their business.⁶ So false answers to the reports of the company to the State auditor, and the failure of a beneficial society to number consecutively its certificates of membership, which was thought had a tendency to deceive, were both considered grounds for the company's dissolution.⁷ In Colorado the court stated that the superintendent of insurance had almost unlimited power in the investigation of the affairs and management of these corporations.⁸ The bond required in Kansas from a life association under the Laws of 1885, c. 181, is a bond of the

¹ *First Nat. Bank v. Continen. L. Ins. Co.*, 13 Ins. L. J. 510 (Oh.).

² Gen. St. 1865, p. 354.

³ Act of March 10, 1869, Art. 3; *St. Joseph F. & M. Ins. Co. v. Hauck*, 62 Mo. 112. See *Re Blue Ribbon L. Acc. Mut. and Industrial Assur. Co.*, 6 Times L. R. 6, as to the right to change the investment of a fund paid into court previous to the formation of the company under the Life Assurance Companies' Acts of England.

⁴ *State v. Vigilant Ins. Co.*, 14 Ins. L. J. 234 (Kan.). See as to the uncon-

stitutionality of the acts because of a defect of title, *Sherman v. Commw.*, 82 Ky. 102; *Wardle v. Townsend*, 75

Mich. 385; *Skinner v. Wilhelm*, 63 Mich. 568; *State v. Mathews*, 44 Mo. 523.

⁵ *Diversey v. Smith*, 103 Ill. 378; *Hart v. Achilles*, 28 Barb. (N. Y.) 576.

⁶ *State v. Mathews*, 44 Mo. 523.

⁷ *Chicago Mut. L. Indemnity Ass'n v. Hunt*, 127 Ill. 257.

⁸ *Spruance v. Farmers' & Merch. Ins. Co.*, 9 Colo. 73.

officers and not of the corporation, because it states the officers shall give to the superintendent such bond for the benefit of the parties, and as the officers were to be annually elected it lasts only a year.¹ Certain States forbid insurance agents, under the penalty of a misdemeanor, to grant rebates on premiums to the insured, which is constitutional, and applies to agents of foreign companies.²

66. It is not unusual for the statutes of the different States to require insurance companies to deposit in each State, where they do business, securities in a certain amount over and above the capital or other assets of the company, for the security of policyholders ; and also to prescribe rules for the investment of the "reserve fund," as well as the percentage at which it shall be accumulated. It was held in New York,³ that an association organized under the Act of 1875, for the protection and relief of its members through a system of purely voluntary assessments, with no fixed capital, is not subject to the laws as to a reserved fund, there being no capital or compulsory assessments. And in Colorado the court stated that mutual insurance companies do not appear to be required to maintain a reserve fund.⁴ In New York⁵ the Act of 1866,⁶ authorizing an existing company to deposit with the superintendent of the insurance department a fund for the security of the registered policyholders, was held not to conflict with the provisions of the State Constitution⁷ as to the creation of a corporation by special Act, as it only regulated one previously created ; neither did the Act nor similar provisions of the Acts of 1867 and 1869⁸ violate the constitutional provision against the giving the credit of the State in aid of any individual association or corporation,⁹ as the credit of the State is not involved, it being only responsible as a depository. Nor do the provisions in sections 7 and 8 of the Act of 1869, providing for arresting the business of the corporation and the appointment of a receiver when injurious to the public, conflict with the Federal Constitution in depriving a person of property without due process of law.¹⁰ But these funds,

¹ *Kaw L. Ass'n v. Lemke*, 40 Kan. 661.

⁶ Laws N. Y. 1866, c. 576.

² *People v. Formosa*, 131 N. Y. 478.

⁷ Art. 8, sec. 1 (N. Y.).

³ *People v. Mut. Endowment, Etc.*, 11 Ins. L. J. 859 (N. Y.).

⁸ Laws of 1867, c. 708 ; Laws of 1869, c. 902.

⁴ *Spruance v. Farmers' & Merch. Ins. Co.*, 9 Colo. 73.

⁹ Art. 7, sec. 9.

⁵ *Att'y Gen'l v. N. Amer. L. Ins. Co.*,

¹⁰ *Att'y Gen'l v. N. Amer. L. Ins. Co.*,

82 N. Y. 172.

82 N. Y. 172.

it has been held, should not exceed what is required by the general law or the company's charter, or authorized resolutions of the directors, and the excess in profit belonging to the company.¹ The securities deposited are usually in the nature of a trust fund for the policyholders of the depositing company, and not a security for general creditors.² When the statute³ requires securities to be deposited in trust for the policyholders, the receiver on an insolvency cannot take control of these assets, because they are held under a special trust to be distributed by the trustee himself.⁴ Though it has been held, interest accruing from securities deposited, and remaining in the hands of the trustee for benefit of policyholders, would go to the receiver under the Connecticut statute, though not the securities.⁵ After the policyholders are satisfied, other parties, such as for instance the makers of accommodation notes and mortgages given to a company for the purpose of deposit, take subject only to the rights of the policyholders, as, except for the purpose for which they were given, the company has no right in them as against the makers.⁶ But it has been held, if the securities belong out and out to the company, they may be applied after the rights of the policyholders are satisfied to the debts due the general creditors.⁷ In *Nicholson v. Nicholson*,⁸ an insurance company was required by its deed of settlement to create a reserved fund, and not to declare dividends till this was done. It did not do so, but declared triennial bonuses, and finally amalgamated and a certain proportionate part of the surplus assets was distributed. In a contest between two parties claiming them under a trust deed, the court held these assets to be capital and not income, as they were to be considered as the reserve fund till they should have been handed over by way of bonuses. In the event of insolvency such a fund is not confined to such holders as obtain judgment against the company before the appointment of a receiver.⁹

¹ *Carlton v. South. Mut. Ins. Co.*, 72 Ga. 371.

⁵ *Ib.*

² *Relfe v. Columbia L. Ins. Co.*, 76 Mo. 594; *Falkenbach v. Patterson*, 43 Oh. St. 359; *Moies v. Economical Mut. L. Ins. Co.*, 12 R. I. 259.

⁶ *Falkenbach v. Patterson*, 43 Oh. St. 359.

⁷ See *Moies v. Economical Mut. L. Ins. Co.*, 12 R. I. 259.

⁸ 30 L. J. Ch. 617.

⁹ *Gen. St. Conn.* 1888, § 2914.

⁴ *Cooke v. Warner*, 56 Conn. 234.

⁹ *Relfe v. Columbia L. Ins. Co.*, 76 Mo. 594.

67. It has frequently been contended that mutual associations organized on a co-operative plan or intended for the support of widows and orphans, etc., are not technically insurance companies, and, therefore, are not subject to the various statutes regulating the business of insurance. As a general rule, however, the courts have held that contracts by societies to pay money, on the happening of some contingency in accordance with a series of rules, to some one named, in consideration of a sum of money, in some of which, as in life associations, the admission depending on health or age, are substantially contracts of insurance, whether organized for benevolent or speculative purposes;¹ and the certificates of membership issued by such associations are virtually policies.² And such companies have been frequently held to be within the insurance laws applicable.³ In Illinois, however, the court held that a mutual aid society issuing policies on the lives of its members, but intended only to benefit widows, orphans, heirs, and devisees of deceased members, and providing for no annual dues, was not in the general sense an insurance company under the amendatory Act of March 20, 1874, relating to life insurance companies, though possibly within the Act of 1869 relative to such companies; but that it was within the Act a mutual aid society with no means of making profit.⁴ The provision in the Act against members "receiving money as profit" would not apply to money received as a salary by officers.⁵ But when the benefits are, as a fact, given to others than such as are

¹ See *Chartrand v. Brace*, 16 Colo. 19; *Bauer v. Samson Lodge, Etc.*, 102 Ind. 262; *State v. Vigilant Ins. Co.*, 14 Ins. L. J. 234 (Kan.); *Endowment & Benev. Ass'n v. State*, 35 Kan. 253; *State v. Nat. Ass'n*, 35 Id. 51; *Sweet v. Cit. Mut. Reliance Soc.*, 78 Me. 541; *Commw. v. Wetherbee*, 105 Mass. 149; *State v. Merch. Exchange Mut. Benev. Soc.*, 72 Mo. 146; *State v. Farmers' & Mechan. Mut. Benev. Ass'n*, 18 Neb. 276; *Barton v. Provident Mut. Relief Ass'n*, 3 Atlan. R. 627 (N. H.); *Bolton v. Ib.*, 11 Ins. L. J. 401 (N. H.); *Co-operative F. Ins. Co. v. Lewis*, 12 Lea (Tenn.) 136; *Farmer v. State*, 69 Tex. 561.

worth, 71 Ala. 436; *Presbyterian Mut. Assur. Fund v. Allen*, 106 Ind. 593.

² See *State v. Iowa Aid Ass'n*, 59 Iowa, 125; *State v. Nichols*, 78 Ib. 747; *Endowment & Benev. Ass'n v. State*, 35 Kan. 253; *State v. Nat. Ass'n*, 35 Ib. 51; *State v. Vigilant Ins. Co.*, 14 Ins. L. J. 234 (Kan.); *Miner v. Mich. Mut. Benef. Ass'n*, 63 Mich. 338; *Lee Mut. F. Ins. Co. v. State*, 60 Miss. 395; *State v. Merchan. Exchange Mut. Benev. Ass'n*, 72 Mo. 166; *State v. Brawner*, 15 Mo. Ap. 597; *State v. Farmers' & Merch. Mut. Benev. Ass'n*, 18 Neb. 276.

⁴ *Commer. League Ass'n v. People*, 90 Ill. 166.

⁵ *Supreme Commandery v. Ains-*

⁶ *Ib.*

entitled to receive them, strangers, by deceased members, though the declared object of the corporation was for benefits for widows, etc., the business will be considered as that of insurance, and consequently the corporation would be illegal, being formed under the Act of 1872.¹ In Kentucky the Act of March 6, 1876, exempting Masonic orders, Odd Fellows' associations, etc., from the insurance laws, was held not to apply to the Mutual Fund L. Ass'n of New York, which had the elements of an ordinary life company, and was not solely a charitable organization.² So in Missouri the exemption has been held to apply only to a purely charitable body.³ In New York a company paying benefits "when a member reaches the age of seventy-five years, or when by reason of disease or accident such member becomes permanently disabled, etc.," was held to be within the Laws of 1881, c. 256, and not under the general insurance law, as such an age may be said to be physical disability, where the words of the act applied to companies providing benefits for "members or persons suffering from disease or sickness or other physical disability."⁴ In Ohio such corporations formed before and since the general insurance laws were specially exempted therefrom by the amendatory Act of April 20, 1872.⁵ But now corporations in that State are organized for profit and for other purposes than profit; and if for purposes other than profit, though not subject to life insurance laws, they are subject to all the general provisions of chap. I., title ii., applying to corporations organized not for profit;⁶ and any attempt to make profit or dividends for members is void.⁷ In Pennsylvania a beneficial society contemplated by the Act of 29th April, 1874, sec. 1, is distinguished from an insurance company, the former being to accumulate a fund to aid in sickness, death, etc., and cannot do an ordinary insurance business and issue policies for such purpose.⁸

68. Insurance companies are generally taxed as business corpo-

¹ *Golden Rule v. People*, 118 Ill. 492.

² *Sherman v. Commw.*, 82 Ky. 102.

³ *State v. Merch. Exchange Mut. Benev. Soc.*, 72 Mo. 146. See *Whitmore v. Supreme Lodge*, 100 Mo. 36; *State v. Brawner*, 15 Mo. Ap. 597.

⁴ *Supreme Council v. Fairman*, 12 Ins. L. J. 708 (N. Y.).

⁵ *State v. Mut. Protec'n Ass'n*, 26 Oh. St. 19.

⁶ *State v. Standard L. Ass'n*, 38 Ib. 281.

⁷ *State v. Standard L. Ass'n*, 38 Ib. 281; *State v. Monitor F. Ass'n*, 42 Ib. 555.

⁸ *Commw. v. Equit. Beneficial Ass'n*, 137 Pa. St. 412.

rations in the ordinary manner. But it is not uncommon besides to tax them for certain special purposes; such as for the maintenance of public schools, the firemen's beneficial funds, the fire departments, and the like. Sometimes a State delegates to subdivisions of the State and to cities the right to license or tax insurance companies doing business within their limits for such special purposes.¹ In Alabama a statute enacted that every fire or marine insurance company which desires to do business in Mobile County should first pay to the fire department an annual tax, and it was held that this not being for the benefit of a private corporation, but of the general public, the act was not in violation of a constitutional provision, "that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any kind of corporations other than municipal, or for the benefit of any individual or corporation."² But an authority in a city charter to license and tax insurance companies to raise a fund to procure an apparatus for extinguishing fires and constructing reservoirs, does not justify an ordinance levying a tax upon premiums earned by such companies in the city, to constitute a fund for the fire department.³

69. In West Virginia, the Act of March 2, 1864, providing that insurance companies should make a return on their premiums collected and uncollected, etc., was held unconstitutional, because no such taxes were laid on the receipts, etc., of other business companies or individuals, and therefore the taxes levied by this Act were not equal or uniform as required by the constitution.⁴ The Canadian Act of 45 Vict., c. 22 (8), was held validly passed in the name of Her Majesty, as the Queen forms an essential part of the legislatures created for the government of the Canadian Provinces by the British North America Act, and it was further held to be a direct tax, within the functions of the local legislature.⁵

70. It was contended in New York that a mutual insurance company was not liable to be taxed: 1st, because its realty and

¹ See for example *City of St. Louis v.*

Life Ass'n of America, 53 Mo. 466; Ill. 45.

Citizens' Mut. Ins. Co. v. Lott, 45 Ala.

185; *People v. Davenport*, 91 N. Y. 575.

² *Fire Department Ass'n of Mobile v.*

Mobile Mut. Ins. Co., 13 Ins. L. J. 60 (Ala.).

³ *City of Alton v. Ætna Ins. Co.*, 82

Ill. 45.

⁴ *Franklin Ins. Co. v. State*, 5 W. Va.

349.

⁵ *In Lambe v. North Brit. & Mercant.*

F. & L. Ins. Co., 7 L. N. (Can.) 171.

personalty belonged not to it, but to its members ; and 2dly, because the statute levied a tax on capital, and a mutual company had no capital ; but it was held, as the company held the legal title to the property, it was the owner within the statute, and that it was a moneyed corporation having, substantially, capital made up of premiums originally subscribed, moneys made up of accumulations of earned premiums and from other sources, which was used in its business, and therefore should be taxed in respect of it.¹ In Tennessee the tax on the agents of mutual insurance companies applies also to mutual co-operative companies, where these, as has been stated, are not charitable associations.² In Pennsylvania a tax was imposed on all insurance companies, except those "doing business upon the purely mutual plan," and a company originally so incorporated, but subsequently authorized to insure for cash premiums which should not entitle the insured to membership, nor subject them to assessments, was held no longer within the exception in the Act.³ In New York, under the Laws of 1886, c. 679, § 4, "for the taxation of fire and marine insurance companies," it was provided that "Lands and real estate of such insurance companies shall continue to be assessed and taxed where situated for State, city, town, county, village, school, or other local purposes ; but the personal property, franchise, and business of all insurance companies incorporated under the laws of this State, or any other State or country, and doing business in this State, and the shares of stock of said companies shall hereafter be exempt from all assessment or taxation, as in this act prescribed, provided that this section shall not affect the fire department tax of two per cent. ;" and it was held the companies referred to in the Act are clearly exempted from local taxation on their personal property, franchises, and business, except as provided for in the exception clause.⁴ A surety company is an insurance company, and liable to a tax on gross premiums within the New York Laws of 1881.⁵

71. A fund represented by scrip has been held assessable for

¹ *Sun. Mut. Ins. Co. v. Mayor*, 8 Barb. (N. Y.) 450. See also *Dutchess Co. Mut. Ins. Co. v. City of Poughkeepsie*, 51 Hun (N. Y.), 595.

² 12 Lea (Tenn.), 136.

³ *Lycoming F. Ins. Co. v. Commw.*, 10 Ins. L. J. 585 (Pa.).

⁴ *People v. Coleman*, 121 N. Y. 542.

⁵ *People v. Wemple*, 58 Hun (N. Y.), 248.

taxes as property so long as retained by the company.¹ The provision in the Iowa Code that all debts should be first deducted from the taxable assets, was held to mean that from the assets taxable as "money and credits" should be deducted the debts; that is, what the shareholders are entitled to receive on a present distribution, and the amount due policyholders, which would be equal to and be represented by the State reserve fund; and, if such debts exceed the credits, there would be no tax on money or credits.² In Maine, where the statute which provided a tax on all personal property³ excepted⁴ "personal property placed in the hands of any corporation as an accumulating fund for the future benefit of heirs or other persons," it was held that premiums of insurance could not be said to fall within the exception, since they, with accumulations, are not to be paid to any one at a future day, but a fixed sum which is regulated by a contract of hazards, without regard to the amount of premiums, is payable on a contingency, and in case of a lapse it may never be paid; though the insurance here was held not necessarily for the benefit of "heirs or other persons," but that it might be distributed with the insured's estate, like other assets.⁵

72. In a lower court in Ohio it was held that the liabilities of life insurance companies on their policies are debts due within the statute, and may be deducted from their invested funds, premiums, and other credits.⁶ But the "reinsurance reserve" cannot be deducted from the "credits" of a company as a legal debt, as this is not by law "appropriated to any particular purpose, nor is it in the nature of a fixed liability, and therefore not a legal debt," but is part of the general assets.⁷ The obligation to return the unearned premium on a cancelled policy is not a legal debt till a request for cancellation has been made.⁸

73. "Gross income" means full or total receipts, not net income.⁹

¹ *Amer. Fire Ins. Co. v. Comm. of Taxes*, 28 Hun (N. Y.), 261.

² *Equit. L. Ins. Co. v. Board*, 74 Iowa, 178; *Hawkeye Ins. Co. v. Board*, 75 Ib. 770.

³ R. S. c. 6, § 13.

⁴ R. S. c. 6, § 14.

⁵ *Portland v. Un. Mut. L. Ins. Co.*, 70 Me. 231.

⁶ *Franklin L. Ins. Co. v. Plaff*, 11 Ins. L. J. 708 (Oh.).

⁷ *Amazon Ins. Co. v. Cappellar*, 12 Ins. L. J. 165 (Oh.).

⁸ *Kenton Ins. Co. v. City of Covington*, 86 Ky. 213; *People v. Davenport*, 91 N. Y. 575; *Amazon Ins. Co. v. Cappellar*, 12 Ins. L. J. 165 (Oh.).

⁹ *City of Kingston v. Can. L. Assur. Co.*, 18 Ont. R. 18.

Where the tax was "on the gross amount of premiums received from their business during each tax year," it was held the premiums were to be estimated for the year ending last preceding the assessments.¹ Nor was the company liable, where the tax was imposed "on all dividends declared or earned, and not divided," upon dividends declared and actually paid over to the stockholders during the tax year.² Where a mutual company, undertaking to insure for an annual premium not exceeding the actual costs of the year, charges an excess in the policy, but adjusts it by allowing an offset to the annual premium each year of the excess of the maximum premiums of the year before over the costs of the year, the tax on premiums is to be estimated on the maximum annual premiums as set down in the policies, and not on the cash balance actually paid the company.³

74. In *Last v. Lond. Assur. Corp.*,⁴ the tax was on profits, and the company with one body of shareholders carried on three branches—marine, fire, and life insurance business. Its liabilities were discharged out of premiums and income investments allocated to the three branches respectively, and styled the M. F. & L. Funds, but the results were thrown into one profit and loss account, and the dividends declared out of this account, and not out of the profits of the particular branches; and it was held, for the purpose of the income tax, the profits must be calculated on the business as a whole. In the same case it appeared there were "participating policies," entitled to any surplus existing at the end of each quinquennial period in the hands of the company after payment of policies, etc., two-thirds of which was to go to the policyholders by way of bonus or rebate of premiums, and one-third to the company, which bore all the expenses, the portion remaining after expenses constituting the only profits of the shareholders; and it was held by the House of Lords that the sum paid the participating policyholders constituted gains or profits within the Act. But the senior judge, Day, in the lower Court, Brett, M. R., and Cotton, L. J., on appeal, and Lord Bramwell, in the House of Lords, all held the view "that they were not profits and gains."⁵ In *N. Y. L. Ins. Co. v. Styles*,⁶ it was admitted that all

¹ *Cit. Mut. L. Ins. Co. v. Lott*, 45 Ala. 185. ⁴ 12 Q. B. D., 389.

² *Ib.* ⁵ 10 Ap. Cas. 438; 12 Q. B. D. 389;

³ *Ib.* 14 *Ib.* 239.

⁶ *People v. State Treasurer*, 31 Mich. ⁶ 14 Ap. Cas., 381.

funds derived from investments and persons not members were taxable, but it was held no part of the premium income received under the participating policies was assessable to the income tax as profits under schedule D, in respect of annual profits or gains, within the Act of 16 & 17 Vict., § 2, where there were no shares, and only members were holders of participating policies and entitled to share in the assets and liable to losses, and the greater part of the surplus over expenses was returned in bonuses or to reduce future premiums. This was distinguishable from *Last v. Lond. Assur. Corp.*,¹ as there the income was derived from people not members; Lord Halsbury, C., and Lord Fitzgerald, dissenting. In *Clerical, Medical & General L. Assur. Soc. v. Carter*,² the amount of interest arising from investments made by insurance companies to carry on their business, on which the income tax had been deducted at its source, amounted to more than the profits of the company for the assessable year, but during the year interest was also received from investments on which no income tax had been deducted at its source; and it was held the company was liable to pay income tax on such interest under the Income Tax Act³ which imposed a tax "upon all . . . yearly interests of money or other annual payments . . . payable . . . either as a charge on any property . . . or as a personal debt or obligation," etc., under schedule D,⁴ "in respect of the annual profits or gains;" that is, on all interest arising from investments. The society's contention was, where interest arose from an investment necessary to carry on the business, it is only taxable as trade profit, and consequently if no profit was made there should be no taxation. But the Act made no distinction between investments, whether profitable, or only essential for business. There is no such thing as gross profits.⁵

75. Where a life company, in addition to a life business, bought and sold annuities for a lump sum paid by purchasers, such annuities cannot be deducted from gross income in estimating "net profits," but are taxable as annual sums, "payable out of profits or gains," within the Act of 1842, sec. 102.⁶

¹ 10 Ap. Cas. 438.

Last v. Lond. Assur. Corp., 10 Ap. Cas. 446.

² 21 Q. B. D. 339; 22 Ib. 444.

³ Of 1842 (5 & 6 Vict., c. 35), § 102.

⁴ 5 & 6 Vict., c. 35; *Gresham L.*

⁵ Act of 1853; see top of this page. *Assur. Soc. v. Styles*, 62 L. T. R. n. s.

⁶ Per Sir George Jessel, M. R., in 464.

76. Where the tax is on the profits, and not on the premiums, life insurance premiums are not in the nature of annual profits, because each premium has reference to the whole life, and is unlike a fire policy, which may have only one year to run, and therefore "annual profits or gains," for the purposes of the income tax, cannot be arrived at by taking the excess of premiums received during the year over the payments on policies due and the business expenses during the same period.¹ And additions made to the life fund of the company out of the receipts of a year are not subject to the annual income tax as profits.² The party assailing an assessment of property for taxation as excessive must affirmatively show its incorrectness.³

77. In England and the United States statutes have been passed requiring contracts of insurance to be stamped. In England, in *Morgan v. Mather*,⁴ it was held that a contract of insurance without a policy would be illegal, as an evasion of the stamp law. Under the Statute of 30 and 31 Vict., c. 23, sec. 8, a marine policy must be stamped before it is signed or underwritten, and therefore the unstamped initial slip which in England precedes the policy is only an honorary engagement.⁵ In England a policy of insurance on the lives of cattle is an insurance on lives within the Act of 55 Geo. III., c. 184, and liable to a stamp duty.⁶ An instrument headed "policy of insurance," after reciting that A. was desirous of being insured, and the payment of the premiums, witnessed that the corporation guaranteed to the assured payment of a sum of money on a certain date, and provided for a surrender on notice; was held to be an agreement for the purpose of the Stamp Act of 1870,⁷ and not a promissory note.⁸ A deed-poll containing an insurance against fire,

¹ 5 & 6 Vict., c. 35; *Gresham L. Assur. Soc. v. Styles*, 62 L. T. R. n. s. 464.

² *Last v. Lond. Assur. Corp.*, 12 Q. B. D. 389.

³ *People v. Davenport*, 91 N. Y. 575. See *Lond. Mut. Ins. Co. v. City of Lond.*, 15 Ont. Ap. 629, as to how assessment as to taxes can be reviewed in Ontario.

⁴ 2 Ves. Jr. 15, 18.

⁵ *Sasson v. Harris*, 60 L. T. 216; *Thompson v. Adams*, 23 Q. B. D. 361; *Morocco Land & Trading Co. v. Fry*, 11 Jur. n. s. 76; *Fisher v. Liv. M. Ins. Co.*, L. R. 8 Q. B. 469.

⁶ *Atty. Gen'l v. Cleobury*, 4 Exch. 65.

⁷ 33 & 34 Vict., c. 97, section 49.

⁸ *Mortgage Ins. Corp. v. Commissioners*, 20 Q. B. D. 645.

however, may refer to conditions in a printed paper without a stamp.¹ In Iowa a contract written upon three pages of a book, in which it was entered, and stamped upon one page, was held not sufficient to show that the instrument was, in contemplation of the Act, written upon more than one piece of paper, and therefore insufficiently stamped.² In *French v. Patten*,³ the alteration as to the subject-matter after the risk had attached without a fresh stamp was held to vitiate the whole contract, not the contract merely as altered. But in Michigan a power to collect, contained in an assignment of a policy, being nugatory, as the authority it assumed to give would have existed without it, was considered to require no additional stamp.⁴

78. Under the Federal Revenue Stamp Acts of 1864, and those subsequent, it may be stated that in California,⁵ Illinois,⁶ Maine,⁷ Massachusetts,⁸ Michigan,⁹ Missouri,¹⁰ Ohio,¹¹ Pennsylvania,¹² Vermont,¹³ it has been held the omission to affix the stamp to the instrument in order to avoid must be wilful. In Indiana, however, under the Act of 1862, it was held the intent was immaterial.¹⁴ In Iowa, while the intent to defraud the government was considered essential to a liability for the penalty for omitting to affix the stamp as required, yet it was held if the stamp be omitted the instrument will be invalid.¹⁵ In Nevada¹⁶ and Tennessee¹⁷ the absence of a stamp avoided the instrument. In Kentucky¹⁸ it was held so much of the Revenue Act of Congress was unconstitutional as provided that contracts made under State laws should be void, and that no remedy should avail unless the contract had been stamped. In

¹ *Routledge v. Burrell*, 1 H. Bl. 255.

² *Home Ins. Co. v. North West Packet Co.*, 32 Iowa, 223.

³ 1 Camp. 72.

⁴ *Peoria M. & F. Ins. Co. v. Perkins*, 16 Mich. 380.

⁵ *Hallock v. Jaudin*, 34 Cal. 167.

⁶ *Craig v. Dimock*, 47 Ill. 308.

⁷ *Dudley v. Wells*, 55 Me. 145.

⁸ *Tobey v. Chipman*, 13 Allen (Mass.), 123; *Govern v. Littlefield*, Ib. 128; *Green v. Holway*, 101 Mass. 243.

⁹ *Peoria M. & F. Ins. Co. v. Perkins*, 6 Mich. 380.

¹⁰ *Whitehill v. Shickle*, 43 Mo. 537.

¹¹ *Harper v. Clark*, 17 Oh. St. 190.

¹² *McGovern v. Hoesback*, 53 Pa. St. 177.

¹³ *Hitchcock v. Sawyer*, 39 Vt. 412.

¹⁴ *Plessinger v. Depuy*, 25 Ind. 419.

¹⁵ *Hugus v. Strickler*, 19 Iowa, 413.

¹⁶ *Mayward v. Johnson*, 2 Nev. 16;

Wayman v. Torreyson, 4 Ib. 124.

¹⁷ *Miller v. Morrow*, 3 Cold. (Tenn.) 587.

¹⁸ *Hunter v. Cobb*, 1 Bush (Ky.),

Pennsylvania, the words of the Revenue Act of Congress of 1866 to the effect that unstamped instruments should not "be used in any court," were held to apply to the State as well as the Federal courts.¹ In Indiana in *Plessinger v. Deputy*,² and in New York in *Edeck v. Ranuer*,³ the point was not raised. In Connecticut,⁴ Illinois,⁵ Massachusetts,⁶ and Michigan,⁷ it was held the various revenue acts of 1864-66 were only to be intended to apply to the Federal courts.

79. The charter granted by one of the United States may now be said to be a contract between the State and the incorporators, and the grant is taken subject to the limitations contained in the act of incorporation; and if no power of amendment or repeal has been reserved in the grant, none can be exercised *in invitum*, so as to create a breach of any part of the contract.⁸ In Missouri the general Act⁹ "to create an insurance department," requiring existing companies to furnish the State superintendent of insurance with information of their business, etc., was held not to violate the Federal constitution as impairing a contract, for a State can prescribe general police regulations.¹⁰ The Illinois Act,¹¹ which provided that "all insurance companies heretofore organized in the State of Illinois and now doing business are hereby brought under all the provisions of this act," one of which was that all shareholders should be severally liable for all debts and responsibilities of their respective companies, to the amount by them subscribed, until the whole amount of capital stock should be paid in, and a certificate thereof recorded, though apparently neither the charter nor any amendment thereto required that the stock should be fully paid in, was held valid, as the Act did not impair any contract and therefore was not

¹ *Chartiers v. McNamara*, 72 Pa. St. 278. *Lynch v. Morse*, 97 Ib. 458, note; *Green v. Holway*, 101 Ib. 243.

² 25 Ind. 414.

³ *Clomens v. Conrad*, 19 Mich. 170;

⁴ 2 John R. (N. Y.) 923; under the Stamp Act of Congress of July 6, 1797. *Sammons v. Holloway*, 21 Ib. 162.

⁵ See *Ward v. Farwell*, 97 Ill. 593;

Lothrop v. Stedman, 42 Conn. 583.

⁶ *Griffin v. Ranney*, 35 Conn. 239.

⁷ Act of March 4, 1869, § 13 Mo.

⁸ *Latham v. Smith*, 45 Ill. 29; *Chaig v. Dimock*, 47 Ill. 308; *Bunker v. Green*, 48 Ill. 243; *U. S. Express Co. v. Haines*, 48 Ib. 248.

⁹ State of Mo. v. Mathews, 44 Mo. 523; *Price v. St. Louis Mut. L. Ins. Co.*, 3 Mo. Ap. 262.

¹¹ Act of March 11, 1869.

¹⁰ *Carpenter v. Snelling*, 97 Mass. 452;

unconstitutional.¹ So an Act subsequent to incorporation, providing for winding up insolvent corporations and distributing their assets equitably among those entitled thereto, is valid, as no contract is thereby impaired.² So is also an Act declaring a commissioner should be appointed to wind up a company on judicial inquiry, if in his opinion the business carried on is hazardous to the shareholders, as it is not abrogation of a contract, but merely a common law right affecting a remedy.³ So the charter provision as to suing in a particular county may be altered by a general law.⁴ A general law may apply to special charters as well as companies organized under a general act.⁵

80. Where, however, the corporation or a legal majority desire a change in the charter it may be amended;⁶ and even existing contracts of members may be altered where a legal majority, in whom by the company's structure is vested full authority to govern the body, ask for the alteration.⁷ The separation of the county of Alexandria from Virginia was held not to annul a contract by a company incorporated to insure realty in Virginia, as the separation was only one of jurisdiction;⁸ and an act of Congress allowing the company thereafter to insure in Alexandria was decided to be rather a rearrangement of business than a change of the charter.⁹ It has been held that a new charter, not purporting to be an amendment to an old one, though containing the same title and embodying most of its provisions, will be so considered, if from its general scope it is evidently intended to be an amendment, provided no constitutional clause stands in the way.¹⁰

81. In New York the fourteenth section of the Act of 1849, providing for the incorporation of insurance companies, was held to

¹ *Shufeldt v. Carver*, 8 Brad. (Ill.) 545; *Fogg v. Sidwell*, Ib. 551; *Gulliver v. Baird*, 9 Ib. 421; *Felix v. Denton*, 9 Ib. 478; *Gulliver v. Roelle*, 100 Ill. 141.

² *Rockover v. L. Ass'n*, 77 Va. 85.

³ *Sanders v. Hillsborough Ins. Co.*, 44 N. H. 238. See *Ward v. Farwell*, 97 Ill. 593; *Carr v. Un. Mut. F. Ins. Co.*, 285 Mo. Ap. 215.

⁴ *Price v. St. Louis Mut. L. Ins. Co.*, 3 Mo. Ap. 262.

⁵ Ib.

⁶ See *Currie v. Mut. Assur. Soc.*, 4 H. & M. (Va.) 315.

⁷ *Mut. Assur. Soc. v. Korn*, 7 Cranch, 396.

⁸ *Korn v. Mut. Assur. Soc.*, 6 Cranch, 192.

⁹ Ib.

¹⁰ *Hope Mut. F. Ins. Co. v. Beckman*, 47 Mo. 93.

authorize a pre-existing company to extend its charter and change its name by complying with the provisions of the act, from Rensselaer County Mutual Ins. Co. to the Rensselaer Ins. Co.¹ An amendment to a charter must be accepted by a company before it will bind, and the acceptance may be directly by a formal vote, or indirectly by implication from the acts of commission or omission of the members of the corporation and the exercise of corporate power under it.² A statute authorizing a corporation to divide its risks into classes will be considered as legally accepted if the records of a corporation show that a meeting was duly called, a proper notice given, and that business was transacted at it; and the presumption is that a quorum of members was present, unless the contrary clearly appears.³ Where an amendment to a charter is complained of by an existing member of the company he should at once act, for by lying by he loses the right of redress.⁴ But a member has been held not estopped from asserting that an amendment was not legally adopted and not part of his contract, when he was ignorant thereof.⁵ Obviously a legal amendment is binding on all members who become such after its acceptance.⁶

82. If the charter be taken subject to the legislature's right of amendment or repeal, its repeal does not impair the obligation of any contract into which the corporation may have entered.⁷ But a reservation, in an amendment to the charter of an insurance company, of the right of the legislature to bring the corporation under the operation of general laws, does not bind the legislature to enact any specific law, and does not operate as a contract with the shareholders that they shall be subjected to any *specific* additional primary liability on their contracts of subscription; at most it only gives a power to enact such general laws as the legislature in its discretion may deem best for the public good, and which may be legal in their character as to the liability of shareholders.⁸

¹ Rensselaer Ins. Co. v. McMahon, 25 Barb. (N. Y.) 457.

² Lycom. F. Ins. Co. v. Buck, 4 Leg. Gaz. (Pa.) 182; Fell v. McHenry, 42 Pa. St. 41.

³ Cit. Mut. F. Ins. Co. v. Sortwell, 8 Allen (Mass.), 217.

⁴ Hope Mut. F. Ins. Co. v. Beckman, 47 Mo. 93.

⁵ Day v. Mill Owners, Mut. F. Ins. Co., 75 Iowa, 694.

⁶ Lycom. Ins. Co. v. Newcomb, 4 Leg. Gaz. (Pa.) 409.

⁷ Endowment, Etc., v. State, 35 Kan. 253; Hyatt v. McMahon, 25 Barb. (N. Y.) 457.

⁸ Diversey v. Smith, 12 Ins. L. J. 737 (Ill.).

83. Where the right to amend is reserved the legislature may enact that, unless the company make up a deficit in its assets, its charter shall be repealed; and this is not bad as a delegation of judicial power.¹ Nor does it abrogate any contract.² But the legislature cannot so provide as to the disposition of the assets, that its avails should be divided unequally among its creditors, or that the portion of the assets belonging to the shareholders should be diverted from them.³ The Illinois⁴ Act prohibiting joint stock companies of less than \$150,000 capital from establishing an agency in the city of Chicago only applies to those companies organized under the general laws, and does not affect companies existing under prior special charters.⁵ Here one clause of the Act was, that all companies shall be subject to it; and another was that insurance companies may continue the capital in their charter. The constitution of a voluntary corporation is not a charter, but rather in the nature of a by-law, and can be altered at pleasure, subject to the usual formalities necessary to be observed.⁶ It has been held that a repeal of a charter, unless the company should comply with certain provisions within a certain time, did not affect outstanding policies in the event of a failure to comply.⁷

84. The domicile of a corporation is in the jurisdiction of the sovereignty of its creation, and is not capable of migration, though its charter may confer powers which may be exercised outside the territorial limit of its domicile, provided their exercise does not clash with a local law.⁸ But when a corporation exercises its functions beyond the territory of the sovereign who created it, it can only

¹ *Lothrop v. Stedman*, 42 Conn. 583.

See *Ward v. Barwell*, 97 Ill. 593.

² *Chicago L. Ins. Co. v. Needles*, 14 Ill. J. 347 (Ill.); *Atty. Gen'l of N. Y. v. North Amer. L. Ins. Co.*, 82 N. Y. 172. See *Re Life Ass'n of America*, 91 Mo. 177.

³ *Lothrop v. Stedman*, 42 Conn. 583.

⁴ R. S. 1874, c. 73, § 6.

⁵ *People v. Empire F. Ins. Co.*, 88 Ill. 309.

⁶ *Supreme Lodge v. Knight*, 117 Ind. 489.

⁷ *Manlove v. Commer. Mut. F. Ins. Co.*, 47 Kan. 309.

⁸ *Grangers' L. & Health Ins. Co. v.*

Kemper, 73 Ala. 325; *Cin. Mut. Health*

Assur. Co. v. Rosenthal, 55 Ill. 85;

Lycom. F. Ins. Co. v. Langley, 62 Md.

196; *Kennebec Co. v. Augusta Ins., Etc.*,

Co., 6 Gray (Mass.), 204; *Mut. Benef.*

L. Ins. Co. v. Davis, 12 N. Y. 569;

Western v. Genesee Mut. Ins. Co., Ib.

258; *Merrick v. Van Santwood*, 34 N.

Y. 208; *Lycom. F. Ins. Co. v. New-*

comb, 4 Leg. Gaz. (Pa.) 409; *Cowardin*

v. Univer. L. Ins. Co., 32 Grat. (Va.)

445. See *Redpath v. Sun Mut. Ins. Co.*,

14 L. Can, J. 90.

do so by comity and not as a right.¹ Therefore, as a State only permits a foreign corporation to do business within its limits as a favor, a foreign corporation must submit to any regulations the State into which it goes may choose to impose, as a condition precedent to carrying on its business.² Nor can a foreign insurance company withdraw itself from the operation of the foreign statute by the insertion of a clause to that effect in its policies.³

85. A corporation in the United States is not a citizen within that clause of the Federal Constitution to the effect that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."⁴ And it has been held by the Supreme Court of the United States that the issue of a policy is not a transaction of commerce, and therefore the State laws regulating the business of foreign insurance companies do not come within the constitutional clause declaring that Congress shall have power "to regulate commerce with foreign nations and among the several States."⁵ In several cases in the Province of Ontario⁶ it

¹ *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143; *Roger Williams Ins. Co. v. Carrington*, 43 Mich. 252; *Liv. Ins. Co. v. Mass.*, 10 Wall. 566.

² See *Grangers' L. & Health Ins. Co. v. Kemper*, 73 Ala. 325; *Ducat v. City of Chicago*, 48 Ill. 172; *Cinn. Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85; *Walker v. City of Springfield*, 94 Ill. 364; *Pierce v. People*, 106 Ill. 11; *Mut. F. Ins. Co. v. Swigert*, 120 Ill. 36; *Farm. & Merch. Ins. Co. v. Harrah*, 47 Ind. 236; *State v. Ins. Co. of N. A.*, 115 Ind. 257; *Phoenix Ins. Co. v. Commw.*, 5 Bush. (Ky.) 68; *Commw. v. Milton*, 12 B. Mon. (Ky.) 212; *Tatem v. Wright*, 3 Zab. (N. J.) 429; *Fire Department v. Noble*, 3 E. D. Sm. (N. Y.) 440; *People v. F. Ass'n*, 92 N. Y. 311; *Thorne v. Travelers' Ins. Co.*, 80 Pa. St. 15; *Lycom. F. Ins. Co. v. Wright*, 55 Vt. 526; *Slaughter v. Commw.*, 13 Grat. (Va.) 767; *Lafayette Ins. Co. v. French*, 18 How. 404; *Paul v. State of Virginia*, 8 Wall. 168; *Liv. Ins. Co. v. Mass.*, 10 Wall. 566; *Lamb v. Lamb*, 6 Bias. 420; (D. Ind.)

Ehrman v. Tentonia Ins. Co., 1 Fed. R. 471 (E. D. Ark.); *License Tax Cases*, 5 Wall. 462; *Funk v. Anglo-Amer. Ins. Co.*, 15 Ins. L. J. 625 (E. D. Mo.). See *Glasgow & Lond. Ins. Co.*, 34 L. Can. J. 142.

³ *Fletcher v. N. Y. L. Ins. Co.*, 13 Fed. R. 528 (E. D. Mo.).

⁴ Federal Constitution, art. IV, section 2; *Ducat v. City of Chicago*, 48 Ill. 172; *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85; *Farmers' & Merch. Ins. Co. v. Harrah*, 47 Ind. 236; *Phoenix Ins. Co. v. Commonwealth*, 5 Bush. (Ky.), 68; *Commw. v. Milton*, 12 B. Mon. (Ky.) 212; *Tatem v. Wright*, 3 Zab. (N. J.) 429; *Fire Department v. Noble*, 3 E. D. Sm. (N. Y.) 440; *Slaughter v. Commw.*, 13 Grat. (Va.) 767; *Paul v. State of Virginia*, 8 Wall. 168.

⁵ Federal Constitution, art. 1, section 8. See *Paul v. State of Virginia*, 8 Wall. 168.

⁶ *Cit. Ins. Co. v. Parsons*, 7 Ap. Cas. 96.

was contended that sections 91 and 92 of the Ontario Act of 39 Vict., c. 24, which deal with policies entered into or in force in that Province for insurances against fire, and which prescribe certain conditions which are to form part of such contracts, were invalid, because it was not within the powers of the Provincial legislature to pass such an act, as it was not given to them by the "British North American Act of 1867." Section 91 provides "it shall be lawful for the Queen, etc., to make laws for . . . the good government of Canada, in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the Provinces; and for greater certainty, but not so as to restrict the terms of this section, it is hereby declared that (notwithstanding anything in this act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say." Then follow a number of classes of subjects. Then, "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local and private nature comprised in the enumeration of the classes of subjects by this act assigned exclusively to the legislatures of the Provinces." And section 92 reads, "In each Province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated." Then follow the classes. It was held by the Ontario Court of Appeals,¹ following the reasoning of the American case of *Paul v. State of Virginia*,² that the local legislatures of the Provinces had the power to regulate the business of insurance companies within their limits. On an appeal to the Privy Council the judgment was affirmed, though this reasoning was neither affirmed nor denied, the judgment being put upon the ground, that the two sections must be read together, and one if necessary modified by the other; that the words "regulation of trade and commerce" in No. 2, of section 91, include political arrangements as to trade requiring the sanction of Parliament, inter-provincial trade, and perhaps the trade of the whole Dominion, but do not include the regulations of the contract of a particular trade, such as the insurance business; that the words "property and civil

¹ *Parsons v. Queen Ins. Co.*, 4 Ont. Ib. 96; *Johnston v. Western Assur. Co.*, 4 Ont. Ap. 103; *Parsons v. Cit. Ins. Co.*, 4 Ont. Co., 4 Ib. 281.

² 8 Wall. 168.

rights in the Province," in No. 13 of section 92, include rights arising from contract which are not expressly included in section 91, and are not limited to such rights only as flow from the law as the status of persons; therefore the power as to "property and civil rights" conferred by this section does not conflict with the "regulation of trade and commerce" in section 91, and consequently the Act of the Ontario legislature is valid under the Dominion Act.¹ Hence the contention that the Ontario local Act of 39 Vict., c. 24, is invalid because it applies to companies incorporated by an Act of the late Province of Canada and confirmed by the Dominion Parliament, cannot be sustained, as it does not interfere with the status or constitution of companies, but merely provides that if British or foreign colonial companies choose to do business in Ontario their contracts must be subject to certain conditions.² Nor is the Ontario Act inconsistent with the Dominion Act 38 Vict., c. 20, requiring all insurance companies, whether incorporated by foreign or provincial authority, to obtain a license to be granted only upon compliance with the conditions prescribed by the Act.³

86. In *Orr v. Beaver & Toronto Mut. Ins. Co.*,⁴ where two insurance companies, which had been incorporated under the mutual insurance Companies Act of Ontario,⁵ were united into a single corporation, with a new name by virtue of the Dominion Act of 32 and 33 Vict., c. 70, it was held that the Dominion Act, and not the former Act of Ontario, must be deemed to be the company's Act of incorporation, and therefore the Ontario Act of 36 Vict. c. 54, which applied to companies under the Consolidation Act or some special act of the former Province of Canada or of Ontario, did not apply.

87. One of the commonest requirements of a foreign company is that it should file in a designated public office some certificate or statement of its affairs, etc., as a condition precedent to engaging in business.⁶ And this rule will apply, in all probability, though the contract be the only one ever made by the agent in the foreign

¹ *Queen Ins. Co. v. Parsons, Etc.*, 7 Ap. Cas. 96. In *Smith v. Irvine*, 1 Rev. de Legislation, 47 (Prov. Quebec), it was held that insurance is a commercial transaction, though *semble* not in mutual companies.

² *Queen Ins. Co. v. Parsons, Etc.*, 7 Ap. Cas. 96.

³ *Ib.*

⁴ 26 U. C. C. P. 141.

⁵ Con. Stat. c. 52.

⁶ *Cin. Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85; *Wash. Co. Mut. Ins. Co. v. Dawes*, 6 Gray (Mass.), 376; *Brown v. Lord*, 18 Rev. Leg. (Can.) 382.

State.¹ It was held in Iowa that an action to wind up could not be sustained, where the company had failed to comply with the statute in making an annual report, if begun before the company was required to do so.² The requirement of the Indiana Act that the "statement, instrument, and evidence shall be renewed semi-annually, in the months of January and July of each year," was held to give the agents the whole of these two months within which to file a renewal, and that prior to that time during the months the old certificate holds good.³ In Kansas a certificate to a foreign insurance company cannot be issued without the previous payment into the treasury of fifty dollars.⁴ And where the auditor issued a certificate on February 25th, authorizing the company to act till February 28th of the following year, without this previous payment, but on the day the certificate issued drew his own draft for the required sum on the company, which it duly paid, he on the 21st of March paying the money into the State treasury, it was held the certificate was void, as in paying the money he had acted as the agent of the company, and he had paid too late.⁵ Where there was issued to a foreign company, which had previously done business, a certificate antedated and conditioned on its agreeing to be examined later, which was not done, and the company withdrew its agent, a contract of insurance made before the certificate issued, but after the date of the certificate, was held valid.⁶ In *Atlantic Mut. F. Ins. Co. v. Concklin*,⁷ it was objected that a statement was not sufficient within the Statute 1847, c. 273, section 3, which did not show the whole amount of premiums, nor what proportion was paid in cash, nor what security had been given for the remainder, as required by the Act, but it was held a statement setting forth the whole amount of risks, the whole amount of premium thereon, and what proportion was paid in cash, the largest sum on one risk, and the security taken for premiums not paid in cash, being the lien within section 7 of the Act incorporating the company, is good. A mere technical error as to the certificate is

¹ *Wash. Co. Mut. Ins. Co. v. Dawes*,
6 Gray (Mass.), 376.

² *State v. Iowa Mut. Aid Ass'n*, 59
Iowa, 125.

³ *Amer. L. Ins. Co. v. Pettijohn*, 62
Ind. 382.

⁴ *Hart. F. Ins. Co. v. State*, 9 Kan.
210.

⁵ *Id.*

⁶ *Lycom. F. Ins. Co. v. Langley*, 62
Md. 196.

⁷ 6 Gray (Mass.), 73.

not sufficient for avoiding the certificate.¹ If a license to a foreign company does issue, the presumption is that the steps toward getting have been properly gone through.² In Missouri the Act of 1869³ required the foreign insurance company's certificate to be recorded in the county recording office where the contract of insurance was made. But the Statute of 1874⁴ omits this and makes a certified copy of the certificate evidence of authority to a foreign corporation to do business in the State; and while the mere absence of the original from the recorder's office will not imply none exists, still if the insurer assume proof of its existence and shows that it has been in existence for several years, though not in the year in question, the fact of its existence is for jury.⁵ Where the loss of a license to a foreign company which is not required to be recorded is shown, parol evidence is admissible to show its previous existence.⁶ The provisions of the Massachusetts Rev. Sts. c. 37, sec. 42, prohibiting a foreign company from doing business in Massachusetts unless restricted from insuring in any one risk more than one-tenth of their capital, have been held not to apply to a mutual company.⁷ Nor do the provisions of Rev. Sts. 1847, c. 283, sec. 2 as to the capital apply.⁸ The provisions of the Wisconsin Act,⁹ imposing a penalty on accident and life companies in that State which fail to file an annual statement, do not apply to an unlicensed company pursuing there an illegal business.¹⁰

88. Another familiar provision imposed on foreign companies as a prerequisite to business, is the obligation to deposit with the authorities of the State, where it intends doing business, a certain amount of securities for the exclusive benefit of the policyholders.¹¹ Sometimes the deposits are exclusively for the benefit of the domestic policyholders.¹² It was held under the Act in Mississippi

¹ *Amer. Ins. Co. v. Pressell*, 78 Ind. 442.

² *Lycoming F. Ins. Co. v. Wright*, 60 Vt. 515.

³ *Laws Mo. 1869*, §§ 27-30.

⁴ *Mo. Laws*, 1874, § 7.

⁵ *Amer. Ins. Co. v. Smith*, 19 Mo. Ap. 627.

⁶ *Lycom. F. Ins. Co. v. Wright*, 60 Vt. 515.

⁷ *Atlan. Mut. F. Ins. Co. v. Concklin*, 6 Gray (Mass.), 73.

⁸ *Williams v. Cheney*, 3 Gray (Mass.), 215.

⁹ *R. S.* § 1954, Wis.

¹⁰ *State v. U. S. Mut. Acc. Ass'n*, 69 Wis. 76.

¹¹ *Miles v. Economical L. Ins. Co.*, 21, R. I. 259.

¹² *Re Aetna Ins. Co.*, 17 U. C. Ch. 160. See *Re L. Ass'n*, 91 Mo. 177; *State v. Benton*, 25 Neb. 834; *Bockover v. L. Ass'n*, 77 Va. 85.

that a person contracting outside the State with a foreign company has no claim on the fund deposited by a foreign company in the State; but such person will be considered to have elected to look to the general assets.¹ But in Canada, where a contract was made in New York by a New York company with a Canadian policyholder, it was held on its insolvency that the policyholder would still have a right to rank with policyholders on the special deposit-fund created by the Canadian Statute.² Where the Act of 1862 in New York provided that the deposit was to be held for policyholders in the United States, if the foreign company deposit a greater amount than the minimum required, the surplus will be held on the same terms of trust, and not altered by the Act of 1871, c. 888.³ But these deposits of foreign mutual companies are usually for the benefit of all the policyholders, and not only for those of the State into which the foreign company has come; and on insolvency the application of the money will depend on the laws that apply to the corporation at its domicile, for in a mutual company all the members are bound by them; and it has been held the funds cannot be attached by a foreign policyholder, when the laws of the State of origin provided for their control, and proceedings in respect thereof had been commenced in the home forum.⁴ Where an insurance company of Maryland, which had an agency in Alabama, became insolvent, and desired the Alabama insured to send their policies to be cancelled in Maryland, in order to present the certificate for the unearned premiums to the assignee, the general agent in Alabama, without authority, cancelled in his own office all policies issued through him and reinsured in other companies. Some of the new contracts were accepted by the insured, and those who declined were paid by him out of his own funds the amount of the unearned premiums; and he filed a bill to subject the usual securities deposited by a foreign company, "to secure the holders of policies issued by such companies to persons owning property in this State;" but it was held he was not justified in cancelling the

¹ *Piedmont & Arlington L. Ins. Co. v. Wallin*, 58 Miss. 1.

² *Equit. Assur. Co. v. Perrault*, 26 L. Can, J. 382.

³ *Lancash. Ins. Co. v. Maxwell*, 131, N. Y. 286.

⁴ See *Rundall v. L. Ass'n*, 11 Ins. L. J. 249 (La.); *Bookover v. L. Ass'n*, 77

Va. 85; *Davis v. L. Ass'n*, 11 Fed. R. 781 (S. D. Ala.); *Fry v. Charter Oak*

L. Ins. Co., 31 Ib. 197 (E. D. Mo.).

policies without authority, and that they were not legally cancelled;¹ and a lien claimed by the agent on this fund which did not originate in an insurance contract for a personal debt of the company to him was disallowed.² The Michigan Act No. 237, Laws 1881, requiring a deposit with the State treasurer of that State, or with the proper officer of the foreign company's State, does not authorize a foreign company to deposit the amount with a third foreign State where it also happens to do business. Thus, for example, the requirement of the Michigan Act of 1881 of a deposit to be made with the Michigan State treasurer, or with certain officers of the State where the company is "organized," was held not to relieve a British company which had made the requisite deposit in New York, but that a fresh deposit must be made in Michigan.³ Under the Rhode Island⁴ Act which provided, sec. 18,⁵ that "any company so depositing may be permitted to receive and collect the interest and dividends on its securities so deposited" it was held that the treasurer could not arbitrarily refuse to allow them to be collected, though he had a discretionary right to refuse for the benefit of the policyholders. The requirement that a foreign insurance company should have so many "dollars of actual cash capital invested in United States bonds," is not satisfied by a mutual company having the required amount invested in cash assets.⁶

89. Not infrequently the foreign company is compelled to pay a tax, or a certain sum of money, by way of license or fee, for the privilege of doing business in the foreign State, and the legality of these fees has been frequently questioned. It was held in Kentucky that a tax not existing on a domestic company may be imposed on a foreign company.⁷ The Massachusetts Statute of 1880, c. 227, imposing upon every corporation and association engaged within that Commonwealth in the business of life insurance, an annual excise tax, "to be determined by assessment of the same upon a valuation equal to the aggregate net value of the policies in force on the thirty-first day of December then next preceding, issued

¹ *U. S. F. & M. Ins. Co. v. Tardy*, 2 Ins. L. J. 673 (Ala.).

² *Id.*

³ *Employers' Liability Assur. Co. v. Commissioners*, 64 Mich. 614.

⁴ *Moies v. Economical Mut. Ins. Co.*, 12 R. I. 259.

⁵ G. S. R. I., c. 143, § 18.

⁶ *Ins. Co. v. House*, 89 Tenn. 438.

⁷ *Phoenix Ins. Co. v. Commw.*, 5 Bush (Ky.), 68.

or assumed by such corporation or association, and held by residents of the Commonwealth, at the rate of one-half of one per cent. per annum," is constitutional, being justified by the clause in the Constitution authorizing the imposition and levy of "reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatever," within this Commonwealth; though not, under the clause as to a levy of equal taxes on all persons and property, etc.¹ In California it was held that State bonds owned and deposited with a banker in that State by a foreign insurance company, in pursuance of the Act "to tax and regulate foreign insurance companies doing business" in that State, and under the control of its agent there, are subject to taxation as "personal property" within the State, as they are a portion of the company's capital; and that the payment of a percentage of premiums of risks taken by foreign companies is not a subject for taxation, as the Act did not so provide.² In Nevada the tax on foreign companies was regarded as a license, and therefore not repugnant to Art. X. of the State Constitution, for the Article refers to ad valorem taxes.³ So in New York, the particular enactment as to the foreign company was regarded as a license fee, and not a tax, and therefore not opposed to the constitutional provisions as to taxes.⁴

The Ontario Statute imposed a tax at each branch or place of business of the company, and it was held an office of an agent, who did not contract but received applications and delivered policies, and collected premiums, was a branch office or place of business within the Act, and that the annual premiums received at that agency can be taxed if the amount can be ascertained.⁵ The provision in the Nebraska Act imposing a tax on gross premiums which are received within the State of every insurance company, except a mutual company without capital, during the year previous to the year of listing, in the county where the agent does business, was held to render such premiums assessable and taxable as personalty in the hands of such agent, where there happened to be local machinery to raise such tax.⁶

¹ Conn. Mut. L. Ins. Co. v. Commw., 133 Mass. 161.

⁴ People v. F. Ass'n, 92 N. Y. 311.

² People v. Home Ins. Co., 29 Cal. 533.

⁵ City of Kingston v. Can. L. Assur. Co., 18 Ont. R. 18.

³ Ex parte Cohn, 13 Nev. 424.

⁶ Phoenix Ins. Co. v. City of Omaha, 23 Neb. 312.

90. Frequently the State imposes on foreign companies the burden of paying money to a county or municipality for the benefit of special institutions of a public character, such as firemen's benevolent associations,¹ colleges,² and the like, in addition to, or instead of paying a license fee directly into the State treasury. In California the requisition on a foreign company to pay to the treasurer of the county or city where it did business for a firemen's relief fund of such county or city was held, not a license, but purely a tax for municipal purposes, and void under the Constitution, Art. 11, sec. 12, in which "the legislature is prohibited from passing a tax on counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes."³ It was also further held, that a foreign insurer did not waive the right to contest the constitutionality of the tax by doing business in the State⁴ after the passage of the tax act. The court held that the tax, called a license tax, imposed under the Georgia Act by the city of Augusta, by the ordinance of January 5, 1874, upon insurance companies doing business in that city, though a tax and not a license, was valid; as it was a tax on occupations and not technically a tax on property, which last only must be uniform under the Constitution; and therefore a difference in the tax on life and fire insurance companies is not material.⁵ It was held in Illinois that the legislature may authorize a municipal corporation to charge a license fee on foreign companies for the purpose of the fire department.⁶ And the payment of a percentage on the gross premium, instead of a lump sum, would still be a license and not a tax;⁷ and a license can be added to a tax.⁸ Nor would the fact that it only applied to cities with a fire department invalidate it.⁹ Cities incorporated under sec. 30, of the General Law of Illinois of 1879,¹⁰ it has been held, cannot compel a foreign com-

¹ Trustees of Exempt. Firemen's

Benev. Fund v. Roome, 93 N. Y. 313;

Firemen's Benev. Ass'n v. Lounsbury,

21 Ill. 511; Farwell v. Benev. Ass'n of

Paid Fire Department, 4 Brad. (Ill.)

36.

² Medical College of Alabama v.

Muldoon, 46 Ala. 603.

³ City of San Francisco v. Liv. &

Lond. & Globe Ins. Co., 74 Cal. 113.

⁴ Ib.

⁵ Home Ins. Co. v. City of Augusta,

50 Ga. 530.

⁶ Walker v. City of Springfield, 94

Ill. 364.

⁷ Ib.

⁸ Ib.

⁹ Ib.

¹⁰ P. L. 1879, p. 179.

pany to pay a license, for the object of that Act was to tax foreign companies' receipts as other personal property in the State, and makes such taxes take the place of other municipal taxes, and there was given no implied right to license.¹ In Missouri, in *State v. Beazley*,² it was held the State licenses need not be procured by foreign companies, since the passage of the Insurance Act of 1869,³ though such companies are still liable under Art. IV. for county and municipal taxes, fees, and license, etc. In *City of St. Joseph v. Ernst*,⁴ the court held the general law of Missouri incorporating cities of the second class⁵ expressly authorized a city, organized thereunder, to tax as well as license foreign companies, which would not be duplicate taxation. The Sessions Laws of 1887, c. 66, of Nebraska, amending the compiled Statutes of 1885, c. 77, sec. 38, were not to relieve insurance companies from a license tax on their business in cities of the second class and villages, when imposed by ordinance, but were only to relieve such companies from general laws imposing licenses, taxes, etc., under the provision of the Constitution, Art. 9, sec. 1.⁶

The provisions of the New York Acts incorporating the Exempt Firemen's Benevolent Fund⁷ which require foreign companies doing business in the city of New York to pay a percentage on the gross premiums received by them in that city are not unconstitutional; because private acts granting an exclusive privilege to any private corporation;⁸ or by reason of the article against special privileges,⁹ as giving the money of the State to a private undertaking, the body being in the nature of a public charity; or opposed to the article¹⁰ requiring an act imposing a tax to distinctly state the object to which it is to be applied, as it is not a tax but a license to do business; and even assuming it to be a tax, it is not a general tax for State purposes, but a local act. Nor is the requirement within the exemption by the State from additional taxation, when foreign com-

¹ *City of Chicago v. Phoenix Ins. Co.*, 126 Ill. 276. See also *Farwell v. Benev. Ass'n, Etc.*, 4 Brad. (Ill.) 36.

² 60 Mo. 220.

³ Wag. Stat. 732, which repealed Stat. Art. IV. 84.

⁴ 95 Mo. 360.

⁵ R. S. § 4644.

⁶ *City of Columbus v. Hart. Ins. Co.*, 25 Neb. 83.

⁷ § 7, c. 633, Laws of 1866, as amended by c. 962, Laws of 1867; c. 297, Laws of 1870; c. 64, Laws of 1877; and c. 89, Laws of 1879.

⁸ Art. 3, section 18.

⁹ Art. 8, section 10.

¹⁰ Art. 3, section 20.

panies have paid the State tax.¹ The Pennsylvania Act of May 7, 1857, imposing on foreign agencies in Philadelphia a bond to secure payment of a certain per cent. on all their receipts, for the Philadelphia Association of Disabled Firemen, was considered invalid; though apparently the Act was not regarded as imposing a tax, nor a necessary prerequisite to doing business, but rather as an unfair burden; the court deciding they "must respectfully decline for the judiciary department of the government the enforcement of the bond given to secure its payment."² But in *Ætna F. Ins. Co. v. Reading*,³ it was held a foreign company, which has complied with the State Statute of April 4, 1873, may again be taxed under the Act of 1887 by certain cities for revenue purposes. In the latter Act both foreign and domestic companies are taxed alike; and the 17th section of the Act of April 4, 1873, providing that no city should tax insurance companies, is repealed by the Act of 24th May, 1887, sec. 2, which provides that every city of the fourth, fifth, sixth, and seventh classes "should have power to levy and collect for general revenue purposes an annual license tax on insurance companies." In Tennessee the Act of 1875, c. 9, imposed a tax on foreign companies "which shall be in lieu of all other taxes," and an additional tax laid by the Act of 1879, c. 84,⁴ was held valid; for the words "in lieu of all other taxes" may be repealed, because they do not constitute a contract, nor limit the power of subsequent legislatures; and, therefore, the second Act either repealed by implication the first Act, or if it did not repeal, the words were mere surplusage and both Acts stand; and the provision in the Constitution of 1870⁵ that "all acts which repeal, revive, or amend the former laws shall recite in their caption or otherwise the title or substance of the law repealed, revived or amended" was held not to apply to acts which effect a repeal of prior acts by necessary implication.⁶ In Virginia, the city of Norfolk was given power to "tax" property, which was held to include all forms and subjects of taxation, and consequently an occupation; and which would

¹ See Oct. Laws 1880, c. 542; Laws 1881, c. 361. See *Trustees Exempt Firemen's, Etc., v. Roome*, 93 N. Y. 313.

² *Philadelphia Ass'n for Relief of Disabled Firemen v. Wood*, 39 Pa. St. 73.

³ 21 W. N. C. (Pa.) 209.

⁴ § 7, subsec. 53.

⁵ Art. 2, § 17.

⁶ *Home Ins. Co. v. Taxing District*, 4 Lea (Tenn.), 644.

include a tax on insurance companies doing business there.¹ It was also held that the Act imposing a license tax on insurance companies, and exempting them from "any additional" taxation, would not apply to the exemption from city taxation, but only from State taxes, the words "any additional"² clearly implying this. The Provincial Act of Nova Scotia³ of 1888 providing that property of insurance companies doing business in the city of Halifax could be taxed as that of other rate-payers, and also that they should pay a license and a fee for each of several branches of business, was held valid under the ninth subsection of section 92 of the British North America Act.⁴ The case of *People v. Son*⁵ may be referred to for the determination of the question as to how far the resolutions of the trustees, who had the control of the distribution of moneys among villages, would apply when a village had become a town.

91. Where foreign companies are taxed for the benefit of public institutions such as colleges or charities, obviously the latter acquire no vested right therein, but the tax may be at any time repealed at the pleasure of the legislature.⁶

92. In several of the States statutes have been passed allowing foreign companies to do business within their limits, provided they agree not to remove suits in which they may be parties from the State courts to the Federal tribunals; and though this condition has been held constitutional in some of the State courts,⁷ yet the Supreme Court of the United States and some other courts have held it void.⁸ But while such an agreement may be void, the State can revoke the license of the foreign company if it does resort to the Federal tribunals; as a State has a right to exclude any foreign company from doing business within its limits, and the means by which she accomplishes such a result, or the motives of her

¹ *Humphreys v. City of Norfolk*, 25 Wis. 175; *Best v. N. Y. L. Ins. Co.* 2 Grat. (Va.) 97.

² *Ib.*

³ C. 28, § 23.

⁴ *City of Halifax v. West. Assur. Co.*, 6 R. & G. (Nov. Scot.) 387.

⁵ 64 Hun (N. Y.), 321.

⁶ *Medical College of Ala. v. Muldon*, 46 Ala. 603.

⁷ *Glen Falls Ins. Co. v. Judge of Jackson*, 21 Mich. 577; *Drake v. Doyle*, 40

Wis. 175; *Best v. N. Y. L. Ins. Co.* 2 Cin. S. C. R. (Oh.) 329.

⁸ *Ins. Co. v. Morse*, 20 Wall. 445; *Doyle v. Continen. Ins. Co.*, 94 U. S. 535; *Northw. Mut. Ins. Co. v. Elliott*, 7 Saw. 17 (D. Or.); *Newhall v. Atlan. F. & M. Ins. Co.*, 1 Ins. L. J. 89 (D. Pa.); *Metrop. L. Ins. Co. v. Harper*, 3 Hughes, 260 (W. D. Va.); *Ins. Co. v. Morse*, 20 Wall. 445; *Barron v. Burnside*, 121 U. S. 186; *Reichard v. Manhattan. L. Ins. Co.*, 31 Mo. 518.

action, are not the subject of Federal inquiry. In other words, if the foreign company does not abide by its agreement, it must take the consequences in having its license revoked.¹ Conditions as to service of process are also imposed, which will be more appropriately, however, in Book V. discussed under the head of Remedies.

93. Frequently the burden imposed on the foreign company by a State is in the form of a retaliatory law. As, for example, an Act of Indiana provided that a foreign company seeking to do business in Indiana should be subjected to the burdens which the State of the foreigner's domicile may have imposed on an Indiana corporation desirous of doing business in that other State. These laws have been frequently attacked as being unconstitutional, because, when considered as a tax, they delegate to a stranger the power of taxing, and are also unequal taxation, but they have generally been upheld.² Though in Alabama, where the statute provided: "whenever existing or future laws of any State of the United States require of insurance companies incorporated or organized under the laws of the State or of the agents thereof any deposit of securities in such State for the protection of policyholders or otherwise, or any payment of taxes, fines, penalties, certificates of authority, license fees or otherwise, greater than the amount required for similar purposes from similar companies of other States, by the then existing laws of this State, then, in every such case, all companies of such States establishing or having heretofore established an agency or agencies in this State, are required to make the same deposit for a like purpose with the treasurer of this State, for taxes, fines, penalties, license fees, or otherwise, an amount equal to the amount of such charges and payments imposed by the laws of such State, and the agents thereof," and a company which had paid under this clause attempted to resist another license tax imposed by the city of Mobile, the above retaliatory clause was held void, as confiding to a foreign jurisdiction the legislative power of

¹ *Doyle v. Continen. Ins. Co.*, 94 U. S. 535. *Ins. Co. v. Welch*, 29 Kan. 672; *Talbott v. Fidelity & Casualty Co.*, 74 Md. 536; *Re L. Ass'n*, 91 Mo., 177; *State v. Gates*, 67 Mo. 496; *Bockover v. Supt. F. Department*, 8 West R. 322 (Mo.); *People v. F. Ass'n*, 92 N. Y. 311; *State v. Reinmund*, 45 Oh. St. 214.

² See *Goldsmith v. Home Ins. Co.*, 62 Ga. 379; *Germania Ins. Co. v. Swigert*, 128 Ill. 237; *State v. Ins. Co. of N. A.*, 115 Ind. 257; *Blackmer v. Royal Ins. Co.*, 115 Ind. 291; *State v. Fidelity & Casualty Co.*, 77 Iowa, 648; *Phoenix*

taxing citizens in Alabama, as well as allowing unequal taxation of people, which were both unconstitutional; and the payment under this clause being void, the company was held liable to pay the other license tax.¹

94. But in any event the provisions of a retaliatory law cannot be carried out unless there is legal machinery for that purpose, either created by the statute as to foreign companies, or by some other.² In Indiana the retaliatory Act was held not to apply to New York companies, because the Act of New York required foreign companies to pay fees to towns, villages, etc., and there was no machinery in Indiana for the collection of such a tax, as the Indiana statutes clearly showed the State authorities should regulate and collect the tax.³

Section 603 of the Revised Statutes of Missouri provided that if any company of that State should, under the requirements of any law of another State, have on deposit in such other State securities upon which the citizens of such other State had, by virtue of its laws, a lien, claim, or right prior to that of citizens of other States, then no citizen or resident of the State in which such debt deposit is held shall be entitled to share in the distribution of the proceeds of the deposit or other assets in this State, until the amount deposited in such other State should be deducted from the claims of the persons who, by the laws of such State or country, held such prior or superior lien, until the other policy claimants and creditors of said company should have received from the proceeds, or other assets, an equal per centum on their claims. And it was held that a resident of Virginia, who was entitled under the laws of that State to a lien for the sum due as a policyholder, on a deposit of securities in Virginia, was not entitled to be paid in Missouri by the superintendent of insurance a greater sum than sufficient to make him equal to creditors of the same class in Missouri.⁴ And further that the statute does not abrogate any contract,⁵ as it only places the foreign member on an equality with the domestic, and as it does not apply to cases where the dissolution occurred before its passage. In the retaliatory Act of Illinois, whenever any other State

¹ *Clark v. Mobile, Etc.*, 10 Ins. L. J. 357 (Ala.).

² *Blackmer v. Royal Ins. Co.*, 115 Ind. 291.

³ *Brit. Foreign M. Ins. Co., v. Board of Assessors*, 42 Fed. R. 90 (E. D. Wis.).

⁴ *Re L. Ass'n*, 91 Mo. 177.

⁵ *Ib.*

shall require corporations existing under the laws of this State, "and having agencies in such other State" to do so and do, etc., the words "having agencies in such other State" do not fix the time when the Act is to operate, but are only words of description; but the Act operates when the laws of the other State exist, whether an Illinois company has an agency there or not.¹ The Iowa retaliatory statute was held to apply to a New York company insuring in Iowa more than it would have been allowed in New York, and when the New York laws prohibited all foreign from making more than one of several kinds of insurance in that State; and could be restrained by a quo warranto entirely irrespective of whether an Iowa company had ever been so restrained in New York.²

95. There is no doubt that a State may impose a penalty on one who acts as agent of a foreign company, which has not complied with the statute as to such a company.³ In Missouri it was expressly decided that the statutes of that State⁴ visited the penalties on the agents and not the companies.⁵ Under the Code of Tennessee, sec. 2565, an agent of a foreign company who illegally acts, renders himself personally liable for the loss.⁶ The question as to what description of agent such Act is intended to refer to is often a question of difficulty. The Illinois Act, which ran: "The term 'agent' or 'agents' used in this section shall include an acknowledged agent, surveyor, broker, or other person or persons who shall in any manner aid in transacting the business of any insurance company," applies to every one who acts in the capacity of agent for a foreign insurer with its approval.⁷ And any one is held to be an agent who aids the insurer in procuring for the insured a policy.⁸ The words of the Massachusetts statute,⁹ that "no person shall act as agent of an insurance company, not incorporated in this State, until he has complied," etc., under a penalty of a fine, were held to apply not only to agents who act under a general and formed appointment, but also to

¹ *Germania Ins. Co. v. Swigert*, 128 Ill. 237. 89; *State v. Charter Oak Life Ins. Co.*, 9 Mo. Ap. 364.

² *State v. Fidelity & Casualty Co.*, 77 Iowa, 648. ⁶ *Morton v. Hart*, 88 Tenn. 427.

³ *Pierce v. People*, 106 Ill. 11; *Moses v. State*, 65 Miss. 56. ⁷ *Continen. Ins. Co. v. Ruckman*, 127 Ill. 364.

⁴ See *Wagner's Stat.*, secs. 30, 36, 41, 52; pp. 749, 751, 753, 755. ⁸ *People v. People's Ins. Exchange*, 126 Ill. 466.

⁵ *State v. N. Y. L. Ins. Co.*, 81 Mo. ⁹ *Gen. Stat.*, c. 58, secs. 72, 74.

one who may only be employed in a single transaction.¹ In Mississippi, under the Code of 1880, section 1085, providing that one "who shall examine into, or adjust or aid in adjusting any loss for or in behalf of any such insurance company, shall be held the agent of such company," an adjuster was held liable.² In Pennsylvania the Act of January 24, 1849, was held not to apply to transient agents merely sent to invite applications.³ And the Statutes of April 26, 1887, and of April 4, 1873, prohibiting persons from "paying, or receiving, or forwarding any premiums, applications for insurance, or in any manner securing, helping, or aiding in the placing of any insurance," were held to apply to those persons who professionally engage in that business, as brokers and agents, and not property owners who occasionally insure.⁴ The Texas Act of 1879 was held to include a soliciting agent.⁵ And the Wisconsin Act of 1871, secs. 1 & 3, c. 13, also includes a soliciting agent; and where one represents several companies, soliciting for each was held a separate offence, though the solicitor had made a single contract with the insured to place the various risks on his property.⁶ On a suit by the insurer on a note, evidence of the plaintiff to show the agent's fraud to induce insurance, is also good to show a non-compliance with the statutes as to foreign companies by the insurer.⁷ The fact as to whether one is an agent, is under the Court's instruction for the jury.⁸

96. In some States where there is a non-compliance with the statute, and a penalty imposed therefor, the contract has been held enforceable in a suit on the premium note by the insurer.⁹ While in other States the contract has been held not absolutely void, unless so declared by the legislature, and, therefore, even if partially void,

¹ *Hart. Live Stock Ins. Co. v. Matthews*, 102 Mass. 221. See *Roche v. Ladd*, 1 Allen (Mass.), 436, in reference to a prior statute.

² *Moses v. State*, 65 Miss. 56.

³ *Thornton v. West. Reserve Farmer's Ins. Co.*, 31 Pa. St. 529.

⁴ *Commw. v. Biddle*, 139 Pa. St. 605.

⁵ *Smith v. State*, 18 Tex. Ap. 69.

⁶ *State v. Farmer*, 49 Wis. 459.

⁷ *Wash. Co. Mut. Ins. Co. v. Dawes*, 6 Gray (Mass.), 376.

⁸ *People v. People's Ins. Exchange*, 126 Ill. 466.

⁹ *Columbus Ins. Co. v. Walsh*, 18 Mo. 229; *Clark v. Middleton*, 19 Ib. 53; *Un. Mut. L. Ins. Co. v. McMillen*, 24 Oh. St. 67; *Conn. River Mut. F. Ins. Co. v. Whipple*, 61 N. H. 61; *Berry v. Knights Templars, Etc., Ins. Co.*, 46 Fed. R. 439 (W. D. Mo.). The decision in *Haverhill Ins. Co. v. Prescott*, 42 N. H. 547, is on an earlier statute, and does not now apply.

that an insurance company who has acted illegally cannot set up its own illegal act as a defence on a policy, as the statute is for the protection of the insured, who are not bound to see whether the company had acted legally or illegally in the premises.¹ In still other States the contract has been held absolutely void where there is a non-compliance with the statute, though a penalty is prescribed.²

97. In Indiana and in Massachusetts, under the latter's statutes, though the foreign company had not complied at the formation of the contract, a subsequent compliance was held sufficient.³

98. It has been held in Illinois,⁴ Massachusetts,⁵ and Pennsylvania,⁶ that a contract made outside the State through the medium of one in the State is valid, though the foreign company has not complied with the statute. Under the New York Act which imposed a penalty on a foreign agent, who, before doing business in a municipality, had not given a bond to pay certain fees to the municipality, and provided that the action therefor should be tried in the county where the

¹ *Brooklyn L. Ins. Co. v. Bledsoe*, 526; *Ætna Ins. Co. v. Harvey*, 11 Wis. 52 Ala. 538; *Ehrman v. Teutonia Ins.* 394; *Lamb v. Ib.* 6 Wis. 420 (D. Co., 1 Fed. R. (D. Ark.) 471. See *Ind.*). See *Un. Cent. L. Ins. Co. v. Wiestling v. Marthim*, 20 Ins. L. J. Thomas, 46 Ind. 45; *Hoffman v. Banks*, 1026 (Ind.); *Ganser v. Fireman's* 41 Ind. 1.

Fund Ins. Co., 34 Minn. 372; *New Eng. F. & M. Ins. Co. v. Robinson*, 25 Ind. 536. See also *Cin. Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85; *Scammon v. Commer. Un. Assur. Co.*, 9 Ins. L. J. 715 (Ill.); *Stratham v. N. Y. L. Ins. Co.*, 45 Miss. 581; *Watertown F. Ins. Co. v. Simons*, 9 Ins. L. J. 597 (Pa.). In New Jersey it was held the insurance company, not complying, could not recover on a note, but it was not decided, but left open whether the insured could recover on his policy; *Columbia F. Ins. Co. v. Kinyon*, 37 N. J. L. 33. See *Stewart v. Northampton Mut. Live Stock Ins. Co.*, 38 Ib. 436.

² *Franklin Ins. Co. v. Louisville, Etc., Packet Co.*, 9 Bush (Ky.), 590; *Barbor v. Boehm*, 21 Neb. 450; *Beneo v. Yesler*, 6 W. Coast, 809 (Or.); *Lycum F. Ins. Co. v. Wright*, 55 Vt.

³ *Amer. Ins. Co. v. Wellman*, 69 Ind. 413; *Lester v. Webb*, 5 Allen (Mass.), 569; *Nat. Mut. F. Ins. Co. v. Pursell*, 10 Ib. 231; *Provincial Ins. Co. v. Lapsley*, 15 Gray (Mass.), 262; *Mass. Stat.* 1854, secs. 31, 32, and 36. See the Mass. decisions under the prior statutes: *Wash. Co. Mut. Ins. Co. v. Hastings*, 2 Allen (Mass.), 398; *Williams v. Cheney*, 3 Gray (Mass.), 215; *Hope Mut. L. Ins. Co. v. Chapman*, 6 Ib. 75.

⁴ *Pierce v. People*, 106 Ill. 11. See also *Jones v. Taylor*, 2 Pug. (N. B.) 391; *Allison v. Robinson*, 2 Ib. 103.

⁵ *Mass. Stat.* of 1861 and 1862, as to forfeiture of life policies, applies by force of stat. of 1872, c. 325, sec. 7, to foreign companies: *Holmes v. Charter Oak L. Ins. Co.*, 131 Mass. 64.

⁶ *Commw. v. Biddle*, 139 Pa. St. 605.

cause of action or some part of it arose, it was held, the cause of action arose, and was triable in the county where the municipality was situate, no matter where the property was, or in what county the contract was actually signed; for the bond was required to be made to the municipality, and the insurance was to operate on property situate there, and the penalty was payable there; and the court in a dictum apparently repudiated the idea that a foreign company can retain agents in New York and issue policies outside the State, and thus be allowed virtually to act in the State and yet escape the penalty imposed by the statute; though here the contract and policy were both made in New York.¹ In *Employers' Liability Assur. Corp. v. Employers' Liability Ins. Co.*,² in a lower court, it appeared that the defendant, a New Jersey company, had been excluded from doing business in New York, because its name bore too close a resemblance to that of the plaintiff, which was an older corporation and had for years acted in New York. The court declined to enjoin the defendant from using the plaintiff's name, as names were common property to all the world, but did enjoin the defendant from insuring persons in New York, though the contracts were apparently made outside the State through agents acting in it, as the court held the Act was thus practically violated.

99. But it has been held in New York, under certain circumstances, at least, the contract is not necessarily void when made outside the State, though the company or its agent have not complied with the laws of the foreign States. Thus, where an Ohio agent of a New York company doing business in Ohio transmitted the application to New York, where the contract was made, it was held not to come within the Ohio Act, being a New York contract.³ And in a lower court in New York it was held a contract made in New York on Pennsylvania property is valid, though it would have been against the laws of Pennsylvania had it been there made, because the agent had not complied with the laws of that State.⁴

¹ *Ithaca F. Department v. Beecher*, 99 N. Y. 429. *Eureka Ins. Co. v. Parks*, 1 Cin. S. C. R. (Ohio), 574; *M. Ins. Co. v. St. Louis, Etc.*, Ry. Co., 41 Fed. R. 643 (E. D.

² 61 Hun (N. Y.), 552.

³ *Hyde v. Goodnow*, 3 N. Y. 266. See also *Lester v. Webb*, 5 Allan (Mass.), 569; *Clay F. Ins. Co. v. Huron, Salt, Etc., Co.*, 31 Mich. 346; *Columbia F. Ins. Co. v. Kinyon*, 37 N. J. L. 33; *Huntley v. Merrill*, 32 Barb. (N. Y.) 626. See also *Clay F. & M. Ins. Co. r. Huron, Salt, Etc., Co.*, 31 Mich. 346;

100. The fact that the policy is on realty in a State does not make it a real contract, nor therefore a contract of that State.¹ When a contract is made outside the State it was held in Kentucky that the payment of renewals in that State was not a new contract, where the insured subsequently removed to Kentucky.² But a contract made by a foreign insurance company in a foreign State in violation of its laws, was held not enforceable in a third State as Kentucky.³ A withdrawal by the insurer of the agency after a valid contract is consummated will not defeat an action upon it.⁴ But it has been held, where the license of a foreign company is revoked before the first instalment falls due on a note, on which payments are to be made annually in advance on a policy for five years, that the insurer cannot recover.⁵

101. With regard to evidence, it has been held in a suit to recover premiums, that the statement of an agent of a foreign insurer after the issue of the policy, that it had not complied with the statute is inadmissible, as this could only be given in evidence while the transaction was pending, *dum fervet opus*.⁶

102. In Massachusetts, it was held that the insured was not entitled to a return of the premium paid to a foreign company which has not complied with the domestic statute relative to it, as the contract is valid, though the company could not recover the premiums or assessments.⁷ In Missouri, the publication for four weeks of the revocation of an insurance company's agency is required under the statute, but the agency ceases *ipso facto* when recalled, and notice

- Merrill v. Knickerbocker L. Ins. Co., An. 737; Lycoming F. Ins. Co. v. 12 Ins. L. J. (N. Y.), 466; Piedmont & Langley, 62 Md. 196.
 Arlington L. Ins. Co. v. Wallin, 58 ⁵ Amer. Ins. Co. v. Stoy, 41 Mich. 385.
 Miss. 1; Hacheny v. Leary, 12 Oreg. 385.
 40; Northampton Mut. Live Stock Ins. Co. v. Tuttle, 40 N. J. L. 476. ⁶ As to proof of what solicitation of the agent is, see People v. Howard, 50 Mich. 239; as to proof of the existence of certificates issued to foreign agents during the year of the contracts, see Thorne v. Travellers' Ins. Co., 80 Pa. St. 15; Amer. Ins. Co. v. Smith, 19 Mo. Ap. 627.
¹ Clay F. & M. Ins. Co. v. Huron Salt, Etc., Co., 31 Mich. 346. ⁷ Leonard v. Washburn, 100 Mass. 251.
² Merrill v. Knickerbocker L. Ins. Co., 12 Ins. L. J. 466 (N. Y.).
³ Ford v. Buckeye State Ins. Co., 6 Bush. (Ky.) 133. See Hyde v. Goodnow, 3 N. Y. 266.
⁴ Michael v. Mut. Ins. Co., 10 La. 251.

is given; hence the premiums paid an agent at any time after revocation must be returned.¹

103. The duty of the superintendent of insurance, when a foreign company has complied with all the requirements of the statute as to foreign companies, is usually purely ministerial, and he must issue a license to do business. Though obviously he can investigate the financial strength of the company, and if not satisfactory decline to license it.² And if in the exercise of an honest discretion he decline to issue it, he cannot be compelled by mandamus.³ Nor will an action on the case lie against him for his refusal.⁴ Though it has been held his action in revoking a license may be controlled by the courts.⁵ In California, under the Act of March 26, 1868,⁶ the insurance commissioner may legally require the insurance company to repair its capital without revoking its license.⁷ When the auditor is required to publish "in the two leading daily newspapers of the State having the largest circulation therein," semi-annual statements of foreign companies doing business in Indiana, he may be compelled by a writ of mandate to do this, but he cannot be compelled to select any particular paper.⁸ The commissioner can only revoke a license after an examination in the manner pointed out by the statute, but if he revoke a corporation's license which, though not within his jurisdiction, was doing an illegal business, it was held in Michigan the courts would not interfere.⁹ In Wisconsin, it is not the duty of the commissioner of insurance to prosecute insurance companies, or their agents, for penalties incurred by them under R. S. section 1974.¹⁰

104. Sometimes the acts, as to foreign corporations, apply to both foreign and domestic companies transacting business, as the R. S. Ont. c. 16.¹¹ In Indiana, the act of June 17, 1852, as to foreign corporations generally embraced foreign insurance corpora-

¹ *McCutcheon v. Rivers*, 68 Mo. 122.

² *Halliday v. Henderson*, 67 Ind.

³ *State v. Moore*, 42 Ohio St. 103.

103.

⁴ *Ib.*; *State v. Benton*, 25 Neb. 834.

⁵ *Nat. L. Ins. Co. v. State*, 25 Mich.

⁶ *State v. Thomas*, 88 Tenn. 491.

321.

⁷ *Kan. Home Ins. Co. v. Wilder*, 43

⁸ *State v. Spooner*, 47 Wis. 438.

Kan. 731.

¹¹ R. L. Sec. 3607, amended No. 45

⁹ *Stats.* 1867-8, p. 536.

of act of 1884.

¹⁰ *Palache v. Pacif. Ins. Co.*, 42 Cal.

418.

tions specifically.¹ In Indiana² and Michigan³ the word "State" in the act was held to include a corporation chartered by the United States. In the Supreme Court of the United States the joint stock companies under the recent acts in England were considered corporations within the act of Massachusetts as to foreign corporations, because they have the usual attributes thereof. Since they had an artificial name to contract, a statutory right to sue and be sued in the name of its officers as representing the association, a statutory recognition of the association as an entity distinct from its members by allowing them to sue it and be sued by it, and a provision for its perpetuity by transfers of shares, so as to secure a succession of membership; while the fact of individual liability of the members did not destroy the corporate idea; though Bradley, J., thought them not corporations but special partnerships, but being incorporated as companies under the laws of a foreign country they would come within the statute.⁴ In *Grangers L. & Health Insurance Co. v. Kamper*,⁵ where the State of Mississippi authorized the Grangers L. Health & Insurance Company, which was incorporated in Alabama, to establish branches in Mississippi, to enjoy all the immunities there enjoyed by it in Alabama by regular organizations, and to get a certificate as a domestic company, it was held it must be considered as a corporation established in Mississippi with like privileges to that in Alabama and not a foreign company.

105. The foreign Act in Indiana was held to apply to mutual companies.⁶ In Iowa, the Ancient Order of Workmen was regarded a foreign company required before doing business to have a specified capital,⁷ and a mandate from the Ancient Order of United Workmen to a grand lodge of this State, as it has not complied with foreign insurance Act, was held invalid.⁸ In Kentucky the Act of March 6, 1877, exempted "certain benevolent and charitable associations from the operations of the general life insurance laws," and provided "that all Masonic orders, Odd Fellows' Associations, and all lodges of

¹ *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 485.

² *State v. Brigs*, 116 Ind. 55; R. S. 1881, § 3765. See also Act of June 17, 1852, 1 R. S. 1876, p. 373; 2 R. S. 1876, p. 281, art. 40, sec. 681; Act Dec. 21, 1865, 1 R. S. 1876, p. 594; *Daly v. Nat. L. Ins. Co.*, 64 Ind. 1.

³ *Employer's Liability Assur. Co. v. Commissioner*, 64 Mich. 614.

⁴ *Liverpool Ins. Co. v. Mass.*, 10 Wall. 566.

⁵ 73 Ala. 325.

⁶ *Lamb v. Ib.*, 6 Biss. 420 (D. Ind.).

⁷ *State v. Miller*, 66 Iowa, 26.

⁸ *Ib.*

the Ancient Order of United Workmen, Knights of Honor, and all other associations of persons incorporated for the sole purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of deceased members," should be exempted from the insurance laws, and it was held the Mutual Reserve Fund Life Association of New York, which, though partially benevolent, was not solely so, and might do a regular life insurance business, was not therefore within the exemption.¹ The provisions of the Massachusetts Rev. Sts., c. 37, sec. 40, requiring the agent of a foreign company desiring to do business in Massachusetts to deposit a copy of their charter with a power of attorney, apply to mutual companies.² A foreign company organized to establish a secret order, to cultivate social and fraternal relations among its members, and furnish aid to sick and disabled, subsisting from voluntary payments and with no dues or premiums, comes within exceptions in the Michigan Laws of 1887, Act No. 187, sec. 25, as to fraternal societies and lodges organized solely for benevolent purposes, and is not within the requirements of How. stat. sec. 4225, as to foreign companies in respect of deposits with the State treasurer.³ In the Virginia Act of 18th May, 1887, excusing assessment companies, who assess only mortuary assessment on survivors, from making a State deposit, the words "surviving members" mean "not deceased" and not those whose policies have "not lapsed."⁴ In Massachusetts a beneficial society was considered within section 5th, of c. 267 of the Act of 1869,⁵ and in Vermont the same conclusion reached.⁶ In Wisconsin a society, "an Odd Fellows' Association, duly incorporated under the laws of Minnesota for the purpose of fraternal benevolent insurance upon the co-operative assessment plan among the members of the Independent Order of Odd Fellows," is one of the "Charitable and Benevolent Order of Odd Fellows" exempt from general insurance laws, Laws 1879, c. 2 & 4, of Wisconsin.⁷

¹ *Sherman v. Commw.*, 52 Ky. 102. Here the act was also held constitutional, as to the subject of the act and title.

² *Gen. Mut. Ins. Co. v. Phillips*, 15 Gray (Mass.), 90.

³ *Ren-enhouse v. Seeley*, 72 Mich. 603.

⁴ *Mut. Benef. L. Ins. Co. v. Marye*, 85 Va. 643.

⁵ *Commw. v. Wetherbee*, 105 Mass. 149.

⁶ *R. L.*, sec. 3607, amended No. 45 of acts of 1884.

⁷ *State v. Whitmore*, 75 Wis. 332.

106. In Nebraska the Laws of 1883, p. 236, only apply to certain specified kinds of insurance, as benevolent, etc., and do not include a general insurance business.¹ And in Virginia it was held that only assessment companies which raise money on death from surviving members can be licensed under the Act of 18th May, 1887, without a deposit required by the Code of 1887, sec. 1271.² In Indiana, in *Daly v. Nat. L. Insurance Company*,³ it was intimated by Howk, J., that if foreign insurance corporations wished to transact in Indiana business of any other description save that of insurance, it is not enough for them to comply with the foreign insurance Act, but they must also comply with the foreign corporation Act. But in *Berkshire L. Insurance Co. v. Royse*,⁴ it was held, even admitting this dictum to be correct, that the loaning of its surplus moneys collected by a foreign company doing business in Indiana, through its ordinary agent in the course of his general agency, is incident to the business of insurance, and did not require a separate compliance with the foreign corporation Act. The statutory prohibition against foreign companies doing a business of insurance or taking risk, etc., was held in Kansas not to apply to a subscription for stock.⁵ Nor is the soliciting of subscriptions to the capital stock of a foreign corporation an act of business contemplated by the Act of June 17, 1852.⁶ Bringing an action for calls is a transaction of business within the Ontario Act,⁷ which forbade any insurance to accept "any risks or issue any policy of insurance, or receive any premium, or transact any business of insurance in Ontario, or to prosecute or maintain suit . . . relating to such business without first obtaining a license," and which further enacted that an order suspending or cancelling the license of a company may be made, which shall then during such suspension or cancellation be held unlicensed.⁸ But in the District of Oregon it was held that bringing a suit is not doing business by a foreign company.⁹ And where a suit by a foreign corporation against an insurance com-

¹ *State v. Northw. Mut. Live Stock Ass'n*, 16 Neb. 549.

² *Mut. L. Benef. L. Ins. Co. v. Marye*, 85 Va. 643.

³ 64 Ind. 1.

⁴ 10 Ins. L. J. 231 (Ind.).

⁵ *Bartlett v. Chouteau Ins. Co.*, 18 Kan. 369.

⁶ *Payson v. Withers*, 5 Biss. 269 (D. Ind.).

⁷ R. S. Ont., c. 160; 42 Vic. 225.

⁸ *Un. F. Ins. Co. v. Lyman*, 46 U. C. Q. B. 471.

⁹ *Northw. Mut. L. Ins. Co. v. Elliott*,

7 Saw. 17 (D. Or.).

pany was the only business done by the foreigner in the State which related to the policy, it was held in Colorado not material that the foreigner had not complied with the statute.¹ But it was held in Oregon that giving a promissory note in payment of a premium due on an insurance policy is "doing business" as to insurance in the territory where the note was given within the Foreign Insurance Act.²

107. Sometimes regulations of insurance law do not apply to foreign insurers at all, or to property outside the country. In *Cameron v. Can. F. & M. Ins. Co.*,³ the court held the R. S. of Ontario, c. 162, only applied to property in Canada. It has been held by the Privy Council that the "Western Australian Joint Stock Companies Ordinances Act of 1858" do not apply to companies incorporated out of Western Australia, which lawfully carry on business as such; and therefore a limited company, incorporated elsewhere, which has not complied with its provisions, may nevertheless act by its members in Western Australia without such members being individually liable for its engagements.⁴ In England the Income Tax Act of 16 & 17 Vict., c. 34, s. 54, provides that: "any person who shall have made insurance on his life or on the life of his wife, or shall have contracted for any deferred annuity on his own life or on the life of his wife, in or with any insurance company, which shall become registered under any act to be passed in the present session of Parliament, which shall comply with the requirements of such act, and any person who shall, under any act of Parliament, be liable to the payment of an annual sum, or to have an annual sum deducted from his salary or stipend, in order to secure a deferred annuity to his widow or a provision to his children after his death, shall be entitled to deduct the amount of the annual premium paid by him from such insurance or contract;" and in c. 91, after reciting it might happen that no act of registration might pass that session, that "any person who shall have made any such insurance or contracted for any such deferred annuity as in the said provision mentioned, in or with any insurance company existing on the 1st

¹ *Tabor v. Goss*, 11 Colo. 419.

² *Beneo v. Yesler*, 6 W. Coast, 809 (Nev.).

³ 6 Ont. R. 392.

⁴ *Bateman v. Service*, 6 Ap. Cas. 386.

See *Igoe v. State*, 14 Ind. 239; *Grubbs v. State*, 24 Ib. 295, where the Acts were held unconstitutional, owing to defective title.

day of November, 1844, or in or with any insurance company registered pursuant to the Act of 7 & 8 Vict., c. 110," should be entitled to the benefit of the aforesaid deduction. And it was held the provision did not apply to an insurance with a foreign company, though it existed before November 1, 1844.¹

108. It occasionally happens that the foreign statute or the foreign company's charter is so framed that it cannot come into the new State at all. It was held in Canada that a New England mutual company, which granted by its charter a lien on property insured, cannot do business in Canada, as no foreign company can make a law giving a lien on property in Canada.² In Illinois, where there were but three kinds of companies recognized by the State—stock, mutual, and companies strictly on the assessment plan—only the first two of which the laws of Illinois permit, the Mutual F. Insurance Company of New York, not being a stock company, and permitting a so-called "capital," consisting of outstanding interest-bearing obligations in the hands of strangers, to pay the interest of which the policyholders must contribute out of the earnings of the company before they can participate in the profits, cannot be called a mutual company, and consequently cannot do business in Illinois.³ In Ohio the statute⁴ provided that a mutual life insurance corporation, organized on the assessment plan under the laws of a foreign State, in order to do business in Ohio must be organized to insure on the assessment plan, and authorized to do the business contemplated by Rev. Stats. 3630—that is, must confine its insurance to the families and heirs of members; and in addition, that the laws of such foreign State must permit Ohio corporations to do a like business within its limits. By the New York statute the members of a company of that description were allowed to designate any beneficiary, and it was held the New York company could not be allowed to act in Ohio under section 3630.⁵ And further, that as the New York statute vested in the insurance commissioner the right of refusing a certificate to such foreign company, "when in his judgment such refusal will best promote the public interests," this did

¹ *Colquhoun v. Heddon*, 24 Q. B. D. 491.

² *Mut. F. Ins. Co. v. Swigert*, 120 Ill. 36.

³ *Genesee Mut. Ins. Co. v. Westman*, 8 U. C. Q. B. 487.

⁴ Act of April, 1883, § 3630 (Oh. L. 180).

⁵ *State v. Moore*, 39 Oh. St. 486.

not give such an Ohio corporation the unqualified right to do business in New York, and was equally fatal to the New York company acting in Ohio.¹

109. The affairs of an insurance corporation, like any other, are under the general supervision of directors, and are managed directly by the usual corporate officers. The agency of a director has been adjudged special.² It has been held immaterial in what manner the stated meetings of the directors have been arranged, whether by usage or common consent, if in fact they are regularly held on certain days.³ But it has been held the business at a meeting called for a special purpose must be confined to that purpose. Thus at a meeting of a mutual fire insurance company called "for the purpose of making such alterations in the by-laws of said company as may be deemed necessary, and for the transaction of such other business as may come before them," after voting for the number of directors (which was legal) the persons present cannot elect the additional directors, when no intimation of any such purpose had been given.⁴ Directors are not liable for mistakes of judgment while acting within the scope of their authority in a judicial capacity in good faith and with reasonable care.⁵ But the act of directors bind only so far as it done is with the scope of their authority, and a shareholder may go into a court of equity for relief against the authorized act of his directors.⁶ The discretion of a director is difficult to define and is usually liberally construed. Thus it has been held a bill by a shareholder will not lie to restrain the directors from paying a loss for which the company was not legally responsible, it being considered by them advantageous for the general interests of the company and not unusual.⁷ But directors have been held liable for an honest division of money which

¹ *State v. Moore*, 39 Oh. St. 486.

² *Adrianse v. Roome*, 52 Barb. (N. Y.) 399.

³ *Atlan. Mut. F. Ins. Co. v. Sanders*, 36 N. H. 252.

⁴ *People's Mut. Ins. Co. v. Westcott*, 14 Gray (Mass.), 440. In *Williamson v. Demers*, 12 Rev. Leg. (Can.) 71, it was adjudged at Montreal, that "l'élection de directeurs de la défenderesse faite à une assemblée convoquée par un certain nombre des actionnaires

de la compagnie, avant que le délai fixé par le chapitre 32 de l'Acte du Canada, 28 Victoria, pour procéder à telle élection fût expiré, est illégal et irrégulière."

⁵ *Vance v. Phoenix Ins. Co.*, 10 Ins. L. J. 43 (Tenn.); *Spering's Ap.*, 71 Pa. St. 11.

⁶ *Chetlain v. Republic L. Ins. Co.*, 86 Ill. 220.

⁷ *Taunton v. Royal Ins. Co.*, 2 H. & M. 135.

should have been applied to the payment of losses;¹ this not being in the nature of their discretion. Certainly directors could not make a binding contract of an extraordinary and unusual nature nor one in which they have a direct interest. Thus, in England, where the directors of a joint stock life insurance company by resolution appointed one of their number to select agents and medical referees for the company, and to be paid therefor a commission on the premiums of all policies effected through such agencies, without having such resolution submitted to the shareholders, it was held, the resolution not being within the exception of the Joint Stock Companies' Act,² the director appointed could not recover.³ So improvidently made contracts of incorporators will not bind the future company. As, for example, where the articles of association signed by seven members contained a clause to the effect that the plaintiff should be solicitor to the company and should not be removed from office except for misconduct, this was held binding only between shareholders *inter se*, or shareholders and the directors, but not to create any contract with the company.⁴ It was held in Ohio that a director of an insurance company could not purchase claims against it.⁵ It has been held that it is the duty of officers in mutual benefit societies to keep books of accounts.⁶

Delinquencies or improprieties of directors or officers of a corporation cannot be set up as a defence by the members for nonpayment of an assessment, but must be attacked in a collateral proceeding.⁷

110. Usually certain officers of a company are directed to execute

¹ *Stewart v. Lee, Etc., Co.*, 64 Miss. 499.

² 7 & 8 Vict., c. 110, which enacts that if any contract or dealing ("except a policy of insurance, grant of annuity, or contract for the purchase of an article, or of service, which is respectively the subject of the proper business of the company") shall be entered into, in which any director shall be interested, then the terms of such contract or dealing shall be submitted to the next general or special meeting of the shareholders to be summoned for that purpose, and that no such contract shall have force until approved and confirmed by the majority of votes of

the shareholders present at such meeting.

³ *Poole v. Nat. Provincial L. Assur. Soc.*, 27 L. J. Exch. 219.

⁴ *Eley v. Positive Government Security, Etc., Co.*, 1 Exch. D. 88.

⁵ *Hanna v. Andes Ins. Co.*, 4 Ins. L. J. 396 (Oh.). See *Bowes v. Hope L. Ins. Co.*, 11 H. L. C. 389.

⁶ *Chicago Mut. L. Indemnity Ass'n v. Hunt*, 127 Ill. 257.

⁷ *Chetlain v. Republic L. Ins. Co.*, 86 Ill. 220; *Nashua F. Ins. Co. v. Moore*, 55 N. H. 48; *Koehler v. Beeber*, 23 W. N. C. (Pa.) 558; *Lycorn. F. Ins. Co. v. Newcomb*, 4 Leg. Gaz. (Pa.) 409.

the policy, whose act, generally speaking, is essential to its validity.¹ The 19th section of the Act of 6 Wm. IV., c. 18, provided, "that any policy signed by the president and countersigned by the secretary, but not otherwise, shall be deemed valid," and the court in Canada held the signatures of both officers to be necessary, but suggested, on the defect being noticed, that the company could be compelled to execute a valid policy, after having given a temporary receipt which obligated them to issue a valid policy.² The Act of 35 Geo. III., c. 63, required the names of the underwriters to be expressed or specified in the policy, and the Act of 6 Geo. I., c. 18, then in force, prohibited any partnership firm other than the two chartered companies from underwriting, and required the names of every individual underwriter to appear in a policy. A declaration on a marine policy in 1849 set out the policy subscribed by the firm, and it was held, as the Act of 6 G. I., c. 18, was now repealed by 5 Geo. IV., c. 114, it did not affect the matter, and the subscription was sufficient under 35 Geo. III., c. 63.³ Under the Act of 30 & 31 Vict., c. 23, 7, requiring that every policy should specify the names of the subscribers or underwriters, and "in case any of the above-mentioned particulars should be omitted such policy should be null and void," the affixing of the common seal of a limited company or corporation insuring, authenticated by the signature of the manager, was held sufficient.⁴ Where the policies of an unregistered and unincorporated association were signed by the managers, "per procuration" of the several members, it was held they were void under the same Act for not specifying the names of the underwriters;⁵ the last case being distinguished from the preceding one by Baron Pollock, in that an unincorporated association has as an entity no legal existence, while in the former case the association was a corporation and was properly represented by its common seal. The charter and by-laws of a Missouri company provided that the policy should only issue on the signatures of president and secretary, and it had been so regularly issued, but being altered to cover other property and endorsed by the secretary alone, it was

¹ *Peoria M. & F. Ins. Co. v. Walser*, *M. Mut. Ins. Ass'n v. Young*, 43 L. T. 22 Ind. 73. n. s. 441.

² *Perry v. Newcastle Dist. Mut. F.* ⁴ *M. Mut. Ass'n v. Young*, *supra*.

Ins. Co., 8 U. C. Q. B. 363.

⁵ *Re Arthur Average Ass'n*, 10 Ch.

³ *Reid v. Allan*, 4 Exch. 326. See *Ap.* 542.

held void.¹ A provision in the charter or by-laws of a New Hampshire company requiring the signature of the president was held enabling, and not to restrict the power to contract in any lawful way, and a policy without it, but valid otherwise, was held binding, the principle *expressio unius*, etc., not applying.² Where the charter allows the president and secretary or any such other officer or officers, as the directors may appoint, to act, they may appoint the president alone.³

111. When the charter or deed of settlement requires an officer's authority to execute a policy to depend upon a previous order or resolution of other people, the principle to be applied appears to be that the party dealing with a company will be presumed to be acquainted with the general or special laws applicable to the business, as well as the provisions of the charter or deed of settlement; but that he may assume that all has been done in the internal management of the concern that should be done to carry out the necessary provisions of the law, and the simple omission of some formality in the internal management will not affect the party so dealing. On this principle it was held in England that a person is not bound in the ordinary course of business to inquire whether the persons signing the policy as directors have been legally appointed, or empowered to use the seal of the company, the policy appearing on its face to be consistent with the articles of association and the acts of Parliament under which it is incorporated.⁴ So where a deed of settlement provided that the policy should be signed by three directors and be sealed with the common seal, and further, that the seal should not be affixed except by an order signed by three directors, it was held the omission of such previous orders was immaterial where the policy was executed by three directors under the common seal.⁵

112. Where the by-laws provided that all applications for a policy should be approved by a committee, a custom to issue a new policy on an old risk without a new application, and, as a general rule, without consulting the committee, was held valid.⁶ Where a

¹ Mound City Mut. F. & M. Ins. Co. v. Curran, 42 Mo. 374.

² Un. Ins. Co. v. Smart, 60 N. H. 458.

³ Topping v. Bickford, 4 Allen (Mass.), 120.

⁴ Re County L. Assur. Co., 5 Ch. Ap. 288.

⁵ Prince of Wales Assur. Soc. v. Athenæum L. Assur. Soc., E. B. & E. 183. To the same effect is Agar v. L. Assur. Soc., 3 C. B. n. s. 725.

⁶ Zell v. Herman Farmers' Mut. Ins. Co., 75 Wis. 521.

secretary and director took an application and note, promising to notify if it was rejected, as it had to be approved by two directors of whom he was one, and no notice was given during seven months till after a loss, it was held the plaintiff could recover.¹ Where the directors are given authority to appoint an officer to sign a policy, proof of the formal vote of such appointment need not be shown.² And where the rules of the company provided that certain risks should be approved by an executive committee of three directors before a policy could issue, and the by-laws vested the president with a general supervision over the company's business, it was held a policy signed by the president, but without the action of the previous executive committee, was valid.³

113. It has been held in Louisiana, that people presenting themselves at an office open for business are justified in supposing the employes are authorized to transact the business they undertake to perform; and when the insured, who had a general policy with the defendants, procured an employé of the defendants to "write up an indorsement in their policy book," though before business hours, the office apparently being regularly open, they were held bound.⁴ Evidence of a general method of business has been held admissible to show the secretary had power to contract.⁵ But it has been decided, where an officer of a company issues a policy to himself, but omits to submit it as required to the executive committee, that the policy is void, as he cannot secure a benefit by a violation of duty.⁶

114. By far the greatest part of the business of an insurance company is effected indirectly through the medium of agents,⁷ and not directly by the officers. The term "general agent" is usually applied to one to whom the company delegates the power to make a contract of insurance on its behalf with an applicant. There is no particular manner of creating an agency by a corporation. It

¹ *Somerset Co. Mut. F. Ins. Co. v. May*, 2 W. N. C. (Pa.) 43.

² *Topping v. Bickford*, 4 Allen (Mass.), 120.

³ *Merch. & Mfrs. Ins. Co. v. Curran*, 45 Mo. 142.

⁴ *Horter v. Merch. & Mut. Ins. Co.*, 28 La. An. 730.

⁵ *Emery v. Boston M. Ins. Co.*, 14 Ins. L. J. 427 (Mass.).

⁶ *Pratt v. Dwelling-House Mut. F. Ins. Co.*, 53 Hun (N. Y.), 101.

⁷ The agent of an insurance company is not necessarily an insurance broker, and need not therefore, as such agent, pay a broker's license: *Bernheimer v. City of Leadville*, 14 Colo. 518.

may be done by writing or verbally, expressly or impliedly.¹ An authority to an agent to act, which is contained in a letter, dates from mailing the letter, not from its receipt.²

115. Sometimes, instead of an individual, a partnership of two or more is appointed to act as agent, and in such a case, as in others, each member can bind the firm.³ But where the partners were appointed as A. & B., "Agents," it was held in Illinois that all must jointly act.⁴ Where one agent alone is empowered in his certificate to act, and enters into partnership with another, and both act for the company with its full knowledge and their acts are recognized, the company will be bound by the acts of each.⁵ Where the general agent A. entered into partnership with B., it was held that the fact that a circular was forwarded to the company's home office, stating that B. was in charge and would "take pleasure in serving both company and patrons under the firm name of A. & B.," imposed no obligation on the company of denying the authority of B. as its agent; and that a policy signed "agent per B." is sufficient to put the insured on inquiry.⁶ Obviously on the death of either partner the power to act would be revoked.⁷

116. With respect to the powers of a general agent, as has been stated, he may usually make the contract which the insurer is empowered to make. Thus he may make a preliminary parol contract to insure, though the charter require all contracts or policies to be written and subscribed, etc., as the latter does not preclude the former.⁸

¹ See *City of Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa, 276; *Warren v. Ocean Ins. Co.*, 15 Me. 439; *Jhons v. People*, 25 Mich. 499.

² *Ruggles v. Amer. Cent Ins. Co.*, 114 N. Y. 415.

³ *Kennebec Co. v. Augusta, Etc., Co.*, 6 Gray (Mass.), 204.

⁴ *Hart. F. Ins. Co. v. Wilcox*, 57 Ill. 180.

⁵ *Newman v. Springfield F. & M. Ins. Co.*, 17 Minn. 123. See also *Conn. Mut. L. Ins. Co. v. Scott*, 13 Ins. L. J. 272 (Ky.).

⁶ *McClure v. Miss. Val. Ins. Co.* 4 Mo. Ap. 148.

⁷ *Martine v. Internat. L. Assur. Soc.*, 62 Barb. (N. Y.) 181.

⁸ *Commer. Un. Assur. Co. v. State*,

113 Ind. 331; *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.), 448; *Putnam v. Home Ins. Co.*, 123 Mass. 324; *Rhodes v. R'way Pass. Ins. Co.*, 5 Lans. (N. Y.) 71; *Angell v. Hart. F. Ins. Co.*, 59 N. Y. 171; *Ellis v. Albany, City F. Ins. Co.*, 50 N. Y. 402; *Hotchkiss v. Germania F. Ins. Co.*, 5 Hun (N. Y.), 90; *Halliday v. Ins. Co.*, 1 Bull. (Oh.) 286; *Campbell v. Amer. F. Ins. Co.*, 73 Wis. 100; *Zell v. Herman Farmers' Mut. Ins. Co.*, 75 Ib. 621; *Ætna Ins. Co. v. Northw. Iron Co.*, 21 Ib. 458; *Constant v. Ins. Co.*, 3 Wall. 313 (D. Pa.); *Commercial Mut. M. Ins. Co. v. Un. Mut. Ins. Co.*, 19 How. 318. See also *Hart. F. Ins. Co. v. Wilcox*, 57 Ill. 180.

It is not unusual to issue a receipt or memorandum of insurance without a policy.¹ These are usually issued by agents and framed to bind temporarily until the home office shall finally accept or reject the risk; though in England such a memorandum or "slip" for a marine policy, owing to the stamp law, is merely an engagement in honor.² But such a slip in respect of a fire risk is binding.³ Probably a general agent may bind the insurer by an interim receipt.⁴ Where the agent was in the habit of giving receipts, it was held a note, printed on the application, "The applicant is requested to answer the above questions fully, as it is especially agreed on the part of the applicant that this survey, as well as the diagram of the premises, shall form a part, and be a condition of this insurance contract," was not notice that the answers were indispensable to the capacity of the agent to bind by intermediate insurance.⁵

117. The interim receipt usually provides for an insurance for a certain or contingent period. Where a receipt provided for a thirty days' insurance and that a policy should immediately be prepared by the company if the application be approved, and if not approved the applicant was to be notified without delay, when the insurance should cease "unless the applicant is sooner notified of its rejection," it was held that after the thirty days the risk ceased, and the failure of the company for more than thirty days to give notice was not material.⁶ Where the clause ran, "a policy shall be exchanged for this within thirty days from this date, provided the risk is accepted; but if rejected, this temporary policy shall become void on receipt of such rejection at this office," it was held there was an option to reject which, if not exercised within the thirty days, bound the company.⁷ In *Hawke v. Niag. Distr. Mut. F. Ins. Co.*⁸ the receipt stated "the property to be considered insured until otherwise notified, either by notice mailed from the head office or by

¹ *O'Conner v. Imperial Ins. Co.*, 14 L. Can. J. 219. See *post*, § 137.

² See *Mackenzie v. Coulson*, 8 Eq. Cas. 368.

³ *Thompson v. Adams*, 23 Q. B. D. 361.

⁴ See *Putnam v. Home Ins. Co.*, 123 Mass. 324; *Goodwin v. Lond. & Lancash. F. & L. Ins. Co.*, 18 L. Can. J. 1.

⁵ *Rowe v. Lond. & Lancash. F. Ins. Co.*, 12 U. C. Ch. 311.

⁶ *Barr v. Ins. Co. of N. A.*, 61 Ind. 488.

⁷ *Kennedy v. N. Y. L. Ins. Co.*, 10 La. An. 809.

⁸ 23 Grant Ch. (Can.) 139.

me, to the insured's address within one month from the date thereof, when, if declined, this receipt shall become void and surrendered: N. B. Should applicant not receive a policy in conformity with his application within twenty days from the date thereof he must communicate with the secretary direct, as after one month from this date the receipt becomes void." The agent neglected to transmit the application to the company, and issued, to quiet the applicant at not getting a policy, successively several new interim receipts, and it was held that the renewed receipts were valueless, not being new insurances, but the agent's neglect could not prejudice the applicant; that the mere lapse of a month without notice did not render the receipt void, but gave the company the right to avoid it within a month only on notice, and on not doing so it was good for a year. Such a clause as "unless previously cancelled this receipt will bind for thirty days from the date thereof and no longer, after which time the risk shall be considered cancelled," was held to bind unless previously cancelled, but not absolute during the temporary period.¹ Where the agent is authorized "to bind the company during correspondence," and through his neglect the application is not received or acted on by the company till after a loss, the company is liable.² Where the general agent receipted and agreed if the application were approved to furnish a policy in thirty days or return the money, but to assume no liability till the company approved the risk and issue of the policy, and within the thirty days an executed policy was sent to the agent, but the applicant died before its delivery, it was held the policy did not operate as a present insurance, as it need not be delivered for thirty days, and might be withdrawn at any time within that time, nor was it an interim insurance, as that had been expressly repudiated.³ If the agent gives a policy on condition of his company's approval, it was held that notice of disapproval to him was sufficient.⁴ It has been held in Ohio, where a contract is completed so far as it lies on the part of the insured, but the agent is without

¹ See *Compton v. Mercant. Ins. Co.*, 23 Grant Ch. (Can.) 139. See 27 U. C. Ch. 334; *Kelly v. Isolated More v. N. Y. Bowery F. Ins. Co.*, 55 Risk & Farmers' F. Ins. Co., 26 U. C. C. Hun (N. Y.), 540.
P. 299; *Goodfellow v. Times & Beacon* ² *Marks v. Hope Mut. L. Ins. Co.*, 17 U. C. Q. B. 411. 117 Mass. 528.

³ *Fish v. Cottenet*, 44 N. Y. 538; ⁴ *Young v. Newark F. Ins. Co.*, 59 *Hawke v. Niagara Dist. Mut. F. Ins.* Conn. 41.

authority to issue the policy unless "approved" by the company, that if the contract is otherwise regular and fair this binds the company; as the company has only the right to object to a bad risk, but it cannot object arbitrarily.¹ But this decision was doubted, possibly reversed, by the court in *Medina Co. Mut. F. Ins. Co. v. Palm*,² Thurman, C. J., giving the opinion. Where the authority of the agent is restricted as by a clause in the application, that "only the home officers of the company . . . have authority to determine whether or not a policy shall issue on application," and he gives an absolute receipt to bind till a policy is received, it was held, even admitting that the agent had been authorized to bind till the company should take action, the receipt would cease to be operative after the applicant had been notified of the company's rejection of his offer, for, in the face of the above restriction of the agent's powers in the application, the insurer could not be held bound to issue a policy.³ Such phrases of acceptance in the receipt, as "if approved by," or "on approval," as a rule, refer to the home or principal office.⁴

118. It has been held that an agent intrusted with printed forms in blank, signed by officers of the company, to be subsequently filled out and issued by him, may, before delivery of the policy or payment of premium, add such a memorandum as that the building insured is in process of construction; and this, even if he do not make a monthly return as instructed by the company, but only informs them after the loss, though the building by the application appears to be finished, and there is a clause therein that the construction, etc., shall be a warranty on the part of the insured.⁵ But he cannot insert any unusual conditions in the policy.⁶ It has also been held that such an agent may make a material erasure.⁷ But the agent cannot make a mere collateral agreement which does not involve the execution of a policy; as where the agent of the original insurer guaranteed the solvency of certain substituted

¹ *Palm v. Medina Co. Mut. F. Ins. Co.*, 20 Oh. 529.

² 5 Oh. St. 107.

³ *Cotton States L. Ins. Co. v. Scurry*, 50 Ga. 48.

⁴ *Winneshiek Ins. Co. v. Holzgrafe*, 53 Ill. 516.

⁵ *Gloucester Mfg. Co. v. Howard F. Ins. Co.*, 5 Gray (Mass.), 497.

⁶ *Tift v. Phoenix Mut. L. Ins. Co.*, 6 Lans. (N. Y.) 198.

⁷ *Dayton Ins. Co. v. Kelly*, 24 Oh. St.

companies on a cancellation of the original policy, it was held the principal was not bound.¹ It has been held, an agent has no authority to insure property already destroyed.² But an agent, authorized after the preliminary contract to fill up blanks sent to him by the company, may fill up a policy after a loss.³ But it has been decided that though an agent has the right to investigate a charge of incendiarism, a company will not be bound as a rule by criminal proceedings begun by their agents, unless specially authorized.⁴ And where it was a general custom that a general agent should not bind the company for advertising unless specially authorized, the presumption is that the dealer was acquainted with it, and that he could not hold the company.⁵

119. Where an agent is held out as a general agent or as armed with powers usual in the business, instructions from his principal which are not communicated to the insured, limiting these powers, do not affect the insured.⁶ Thus, where the agent's authority to act is limited by secret instructions to certain localities, no matter how far he may be liable towards his principal for disobedience, his contract will bind the company when he acts outside those limits, if he is held out as a general agent, unless the parties dealing with him are put on their guard.⁷ So the authority of a general agent cannot be secretly limited by his principal, as, for instance, not to take risk

¹ *Constant v. Ins. Co.*, 3 Wall. Jr. 313 (D. Pa.).

² See *Stebbins v. Lanch. Ins. Co.*, 60 N. H. 65; *Blake v. Hamburg-Bremen Ins. Co.*, 67 Tex. 160.

³ *Ins. Co. v. Colt*, 20 Wall. 560.

⁴ *Norman v. Ins. Co. of N. A.*, 4 Ins. L. J. 827 (S. D. Ill.).

⁵ *U. S. L. Ins. Co. v. Advance Co.*, 80 Ill. 549.

⁶ *Woodbury Sav. Bk. Ass. v. Charter Oak F. & M. Ins. Co.*, 31 Conn. 517; *Queen Ins. Co. v. Young*, 86 Ala. 424; *Hart. F. Ins. Co. v. Farrish*, 73 Ill. 166; *Esch. v. Home Ins. Co.*, 78 Iowa, 334; *Miller v. Phoenix Ins. Co.* 27 Iowa, 203; *Ruggles v. Amer. Cent. Ins. Co.*, 114 N. Y. 415. Ibid. See also *Equit. Assur. Soc. v. Brobst*, 26 N. W. R. 204 (Neb.); *Markey v. Mut. Benef. Ins. Co.*, 103

Mass. 78; *Fried v. Royal Ins. Co.*, 50 N. Y. 243.

⁷ *Lightbody v. N. Amer. Ins. Co.*, 23 Wend. (N. Y.) 18; *Mohr, Etc., Co. v. Ohio Ins. Co.*, 13 Fed. R. (S. D. Oh.) 74. See also *Knox v. Loom, F. Ins. Co.*, 50 Wis. 671, where the agent's certificate limited him to a certain area, which the insured did not know, and the company accepted proofs of loss without objection, and it was held they were bound by way of estoppel, and the general question was not decided. It must, however, be observed that the statute (R. S. § 1977) had been construed to change the rule of law that the insured must know at his peril the powers of the agent with whom he deals. And see *Schomer v. Hekla F. Ins. Co.*, 50 Wis. 575.

on smallpox hospital, etc.¹ But if the insured employ one, as, for example, an insurance broker, to place insurance for him, who is also acting on behalf of an agent of the company in soliciting insurance from the insured, the broker is chargeable with knowledge of the limited power of the agent to contract.²

120. Sometimes, however, the area within which the company can contract is limited by the general law, or its charter, and then the agent can only bind within that area.³ A prohibition in a policy to agents to take risks on "distilleries and steam saw-mills," has been held to apply to such in active operation only, and not to buildings intended for that purpose.⁴

121. As a general rule, a general agent cannot delegate his discretionary powers.⁵ But he can employ clerks or subordinate agents to perform ministerial duties⁶—as to solicit insurance, forward applications, sign and deliver policies, collect premiums,⁷ and sell accident tickets.⁸ And even discretionary acts of a subagent, if ratified by the agent, will also bind the company.⁹ In *Paré v. Scot. Imperial Insurance Co.*,¹⁰ a clerk was held to have bound the insurer by an interim receipt; and a parol contract by an authorized subagent has been upheld.¹¹ To avail one's self of the act of a subagent, his authority to act as well as of the agent's authority to appoint him must be proved.¹²

¹ *City v. Peoria M. & F. Ins. Co.*, 17 Iowa, 276. To the same effect is *Merrick v. Provincial Ins. Co.*, 14 U. C. Q. B., 439.

² *Mohr, Etc., Co. v. Oh. Ins. Co.*, 13 Fed. R. 74 (S. D. Oh.).

³ See *Redpath v. Sun Mut. Ins. Co.*, 14 L. Can. J. 90, also *St. Paul F. & M. Ins. Co. v. Parsons*, 47 Minn. 352.

⁴ *Ætna F. Ins. Co. v. Maguire*, 51 Ill. 342.

⁵ *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285; *Equit. L. Ins. Soc. v. Poe*, 9 Ins. L. J. 871 (Md.).

⁶ *Equit. Assur. Soc. v. Brobst*, 26 N. W. R. 204 (Neb.); *More v. Bowery F. & L. Ins. Co.*, 55 Hun (N. Y.), 540; *Kuney v. Amazon Ins. Co.*, 36 Hun (N. Y.), 66; *Deitz v. Providence Wash. Ins. Co.*, 33 W. Va. 526.

⁷ *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117; *Grady v. Am. Cent. Ins.*, 60 Mo. 116; *Krumm v. Jefferson F. Ins. Co.*, 40 Oh. St. 225; *Rossiter v. Trafalgar L. Assur. Ass'n*, 27 Beav. 377. But see *Markey v. Mut. Benef. L. Ins. Co.*, 103 Mass. 78.

⁸ *Brown v. R'way Assur. Co.*, 45 Mo. 221.

⁹ *Continen. Ins. Co. v. Ruckman*, 127 Ill. 364; *Ewing v. Piedmont & Arlington Ins. Co.*, cited *Bliss on Insurance*, § 165 (N. D. Mo.).

¹⁰ 2 *Stephen's Quebec Dig.* 410.

¹¹ *Kuney v. Amazon Ins. Co.*, 36 Hun (N. Y.), 66.

¹² *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285; *Amer. Underwriters' Ass'n v. George*, 97 Pa. St. 238.

122. Another species of agent, besides the general agent and his subordinate agents, that is frequently met with in the books, is what is termed a "local agent," being one not authorized by himself to form a contract of insurance, but possessing certain limited or special powers. He is appointed either by the company or by a general agent, and may act under the latter's general surveillance, or may be directly responsible to the company.¹ One dealing with such species of agent should know his powers, or he deals at his peril.² Probably the general agent could not appoint such a species of agent, if he perform discretionary duties, unless authorized by his principal.³ An exemplification of a common restriction of a local agent is his incapacity to pass upon an application, and his obligation to receive it and not to issue a policy till his principal shall approve the risk.⁴ A special agent cannot make contracts by parol where he can only forward applications;⁵ though he can, if empowered to do so by the general agent.⁶ Nor can he, unless specially authorized, bind by an interim receipt.⁷ And a clause in a policy that it shall not take effect till countersigned, or an advertising card with the agent's name, do not raise the implication that such agent could bind on an application taken subject to the approval of the company.⁸ A local agent is often restricted to certain

¹ See *Equit. L. Ins. Soc. v. Poe*, 9 Ins. L. J. 871 (Md.); *Haden v. Farm. and Mechan. F. Ass'n*, 80 Va. 683; *Summers v. Commer. Un. Assur. Co.*, 6 Duv. (Can.) 19.

² *Equit. L. Ins. Co. v. Poe*, 9 Ins. L. J. 871 (Md.); *Summers v. Commer. Un. Assur. Co.*, 6 Duv. (Can.) 19.

³ *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285.

⁴ See *Gold L. Ins. Co. v. Mayes*, 61 Ala. 163; *Cotton States L. Ins. Co. v. Scurry*, 50 Ga. 48; *Lee v. Guardian L. Ins. Co.*, 5 Big. L. & Acc. Cas. 18 (Cal.) 707; *Winneseik Ins. Co. v. Holzgrafe*, 53 Ill. 516; *Rowland v. Springfield F. & M. Ins. Co.*, 18 Brad. (Ill.) 601; *Walker v. Farmers' Ins. Co.*, 51 Iowa, 679; *Armstrong v. State Ins. Co.*, 61 Iowa, 212; *Pickett v. German F. Ins. Co.*, 39 Kan. 697; *Stockton*

v. Firemen's Ins. Co., 39 Amer. R. 277 (La.); *Todd v. Piedmont and Arlington L. Ins. Co.*, 34 La. An. 63; *Beneo v. Yesler*, 6 W. Coast, 809 (Nev.); *Perkins v. Wash. Ins. Co.*, 6 John. ch. 485; *Chase v. Hamilton Mut. Ins. Co.*, 22 Barb. (N. Y.) 527; *Krum v. Jefferson Ins. Co.*, 5 Bull. (Oh.), 646; *Conn. Mut. L. Ins. Co. v. Rudolph*, 45 Tex. 454; *Haden v. Farmers' & Mechan. F. Ass'n*, 80 Va. 683; *Henry v. Agricul. Mut. Assur. Ass'n*, 11 U. C. ch. 125.

⁵ *Winneseik Ins. Co. v. Holzgrafe*, 53 Ill. 516; *Atkinson v. Hawkeye Ins. Co.*, 71 Iowa, 340.

⁶ *Harron v. City of Lond. F. Ins. Co.*, 88 Cal. 16.

⁷ *Atkinson v. Hawkeye Ins. Co.*, 71 Iowa, 340.

⁸ *Ibid.*

classes of risks.¹ Nor can a special agent authorized to deliver a policy and receive premiums alter a policy after its delivery by making another the payee, although the policy was issued on the application of such agent.² And it has been held, where a special agent neglects to forward an application and there is no interim insurance, the company will not be bound.³ And though the local agent makes an unauthorized parol agreement, under the same circumstances the same result would follow.⁴ Where the application is taken by a special agent, forwarded, and the premium paid, the insurer is not bound by the special agent's delay in refunding or in informing the insured of the refusal of the risk.⁵ But a local or special agent, who is held out as a general agent by the company, may bind by a contract.⁶ In the Revised Statutes of Wisconsin of 1878, sec. 1977, the words "any insurance company" include a mutual company, and agents making contracts are, within the Act, agents "for all intents and purposes."⁷

123. A company that has ceased to do business is not bound to renew a policy on a mere promise by agents whose powers have been revoked; but if the revocation was not known when the promise was made perhaps the agents would be held.⁸

124. The burden is on the plaintiff, relying on the agent's authority, to prove his authority.⁹ If it is by a writing, the writing usually must be proved in order to understand his precise powers; and while it may be true that his powers cannot be enlarged by parol evidence of the usage of certain other agents in like cases, this doctrine must always be understood as qualified by the usages of trade, the evidence of which is admissible, not perhaps to contradict or

¹ *Reynolds v. Continen. Ins. Co.*, 36 Mich. 131.

² *Duluth Nat. Bk. v. Knoxville F. Ins. Co.*, 85 Tenn. 76.

³ *Atkinson v. Hawkeye Ins. Co.*, 71 Iowa, 340; *Armstrong v. State Ins. Co.*, 61 Iowa, 212. See *Walkers v. Farmers' Ins. Co.*, 51 Iowa, 679.

⁴ *Atkinson v. Hawkeye Ins. Co.*, 71 Iowa, 340.

⁵ *Ins. Co. v. Johnson*, 23 P. St. 72; *Conn. Mut. L. Ins. Co. v. Rudolph*, 45 Tex. 454; *Ala. Gold. L. Ins. Co.*

v. Mayes, 61 Ala. 163; *Otterbein v. Iowa State Ins. Co.*, 57 Iowa, 274.

⁶ *Miller v. Phoenix Ins. Co.*, 27 Iowa, 203; *Ansley v. Watertown Ins. Co.*, 14 Q. L. R. 183; *Cockburn v. Brit.-Amer. Assur. Co.*, 19 Ont. R. 245.

⁷ *Zell v. Herman and Farmers' Mut. Ins. Co.*, 75 Wis. 521.

⁸ *Montrose v. Roger Williams Ins. Co.*, 49 Mich. 477.

⁹ *Smith v. State Ins. Co.*, 58 Iowa, 487.

enlarge an agent's written powers, but to interpret those actually ordinarily given to execute the functions of a certain business.¹ But it has been held the production of his letters of attorney is not absolutely essential, but that the scope of the agency may be shown by the course of the company's dealing with reference to their agent.² The scope of the agent's powers is, under proper instructions, for the jury.³

125. The agent must follow strictly his principal's instructions, and he is answerable in damages for disobedience. Thus the agent is liable for a neglect to cancel when so instructed.⁴ An agent would be entitled to a reasonable time within which to cancel, which would depend on surrounding circumstances, and when these are undisputed the question is for the court to determine.⁵ But no unnecessary delay is permitted,⁶ and evidence of a custom that five or ten days' delay is usually given the agent within which to cancel has been rejected.⁷ In an action by the company against an agent for negligence it is competent, for the purpose of relieving him from liability, to prove a custom to procure the cancellation of policies through the broker placing the insurance with the company's agent, when the agent had directed the broker who procured the policy to have it cancelled.⁸ Where an agent was directed by a company to return a policy at once, as the risk was prohibited, but delayed thinking his principal mistaken, though he did so finally, but there was a loss before he notified the insured, it was held the agent was liable for what the company was compelled to pay.⁹ If an agent fails to report all risks at once, as required, the company, in an action

¹ *Hartford F. Ins. Co. v. Wilcox*, 57 Ill. 180. *Assur. Soc. v. Brobst*, 26 N. W. R. 204 (Neb.).

² See *Haughton v. Ewbank*, 4 Camp, 88; *Brockelbank v. Lagrue*, 5 C & P. 21; *Packard v. Dorchester Mut. F. Ins. Co.*, 77 Me. 144; *Blake v. Hamburg-Bremen Ins. Co.*, 13 Ins. L. J. 151 (Tex.); *Ruggles v. Amer. Cent. Ins. Co.*, 114 N. Y. 415; *Robertson v. Provincial Mut. & General Ins. Co.*, 3 Allen (N. B.), 379.

³ See *Hurrell v. Bullard*, 3 F. & F. 445; *Dickinson v. Miss. Val. Ins. Co.*, 41 Iowa, 286; *Ganser v. Fireman's Fund Ins. Co.*, 38 Minn. 74; *Equit. Assur. Soc. v. Brobst*, 26 N. W. R. 204 (Neb.).

⁴ *Phoenix Ins. Co. v. Frissell*, 142 Mass. 513; *Phoenix Ins. Co. v. Pratt*, 36 Minn. 409; *Kraber v. Un. Ins. Co.*, 129 Pa. St. 8.

⁵ *Franklin F. Ins. Co.*, 21 Fed. R. 290 (S. D. Oh.).

⁶ *Phoenix Ins. Co. v. Frissell*, 142 Mass. 513; *Franklin Ins. Co. v. Sears*, 21 Fed. R. 290 (S. D. Oh.).

⁷ *Phoenix Ins. Co. v. Frissell*, *supra*.

⁸ *Franklin Ins. Co. v. Sears*, *supra*.

⁹ *Wash. F. & M. Ins. Co. v. Chesebro*, 35 Fed. R. 477 (D. Conn.).

against him for negligence, after having paid the loss, can show it would have cancelled it, as the loss was then the proximate result of the negligence.¹ An agent is held liable for giving permission in excess of his authority to keep hazardous goods;² or to insure outside of a designated locality.³ But it was held that a company could only recover nominal damages for the agent's failure to notify his principal of the vacancy of a building which was incorrectly stated in the application to be occupied, when the rate paid was greater than that charged for a building really vacant, when the company was in the habit of taking such risks; and it was intimated by the court, that had the premium been less than that charged by the company for such a risk the agent would have been liable for the difference in premium, though not for the amount paid by the company in adjusting the loss.⁴ In New Brunswick, where it had been usual for the broker to receive the premium and credit the underwriters whether it was paid or not, to receive proofs of loss and pay the amount due thereon, and settle semi-annually with the company, it was held that the jury were warranted in inferring that the insurer had authorized the broker so to act; and that he could recover the losses paid by him and the premiums for reinsurances effected by him with the insurer, without proof of actual payment to the latter, as the insured was liable for the premiums to the broker, and the broker to the underwriter, and the reinsurance being authorized, the principal could not set up non-payment by the insured.⁵ It has been held where an agent acts for two companies and one tells him to cancel a risk which he does, and as was the usual custom he transfers *bona fide* the risk to the other, the latter is bound, and the agent is not liable therefor.⁶ The amount of attention an agent should devote to his principal's business depends on the terms of the contract.⁷ And otherwise he is bound to use that degree of diligence which is usual in such a calling.⁸

¹ State Ins. Co. v. Jamison, 79 Iowa, 245.

² Kroeger v. Pitcairn, 101 Pa. St. 311.

³ Hanover F. Ins. Co. v. Ames, 39 Minn. 150.

⁴ State Ins. Co. v. Richmond, 71 Iowa, 519.

⁵ Ranney v. Gregory, 1 Han. (N. B.) 152.

⁶ Conn. F. Ins. Co. v. Kavanaugh, 5 Montreal L. R. S. C. 262. But see Empire State Ins. Co. v. Amer. Cent. Ins. Co., 64 Hun (N. Y.), 485.

⁷ Trimble v. Conn. Mut. L. Ins. Co., 14 Ins. L. J. 475 (Oh.).

⁸ Ehrlich v. Aetna L. Ins. Co., 4 West. R. 37 (Mo.).

126. Several cases have turned on the amount of commission the agent is entitled to on a cessation of the agency. Where the contract was to pay a salary and to give the agent "a regular renewal commission on the policies obtained by him when the premiums shall have been paid by the company" and several bonuses, on the termination of the agency by consent it was held he was entitled to commissions on renewals after the agency terminated, on policies taken out during the pendency of the contract.¹ Where there was an agreement to pay a certain percentage on renewals whilst the policies continued in force, and the agent was dismissed because engaged in procuring policies for another company, though the contract did not expressly forbid it, and he had collected a certain number, the probable expectancy of the life of the policies was shown, and a custom to the effect that the agents acquired a vested property in policies procured by them, and it was left to the jury to say whether he had a property in the policies, and in consequence to receive percentages on renewals.² A mere custom cannot control an express contract, though a general usage as to renewal may; and, therefore, evidence of a custom of the plaintiff's as to commutation of renewals in a question of set-off by the agent against the company in a suit to recover premiums received as agents was not admitted.³ On a contract to pay a percentage on all original or first year's premiums collected and paid, it was held that evidence of a usage to the effect that all premiums should be treated as "collected," though for the convenience of the insured payable by instalments, was inadmissible.⁴ Where the plaintiff became agent through reliance on a circular received by him, that "the usual compensation of an agent . . . is ten per cent. commissions on the premiums, with one dollar for each policy and five per cent. on the premiums on the renewal of the policies," and then subsequently received a circular: "For your services, as above, you will be allowed a commission of ten per cent. on the first premiums (cash and note) and five per cent. on all subsequent renewal premiums, so long as you continue the agent of this company," and acted on this for fifteen years until discharged, when he claimed commissions on

¹ *Hale v. Brooklyn L. Ins. Co.*, 46 Hun (N. Y.), 274.

² *Ensworth v. N. Y. L. Ins. Co.*, 1 Big. L. & Ac. Cas. 645 (Oh.).

³ *Park v. Piedmont & Arlington Ins. Co.*, 48 Ga. 601.

⁴ *Kimball v. Brawner*, 47 Mo. 398.

renewals on policies collected by him, but renewed after his discharge, offering to prove a custom to that effect, the court held the usage was inadmissible, as there was a plain contract.¹ Where the companies' rules provided that an agent should receive a commission of "five per cent. on each renewal collected and transmitted by them," it was held that after a termination of the agency he was not entitled to this on policies procured as agent, but on which the collection and remittance of the renewal had not been made by him, and a custom to that effect was inadmissible on his behalf.² A custom has been admitted to show an agent had a property in policies collected and a right to receive a percentage on renewals after discharge, but there was an agreement that the agent should receive a percentage on renewals so long as such policies should remain in force.³ "The highest commissions that the company paid," is not technical language; and experts could show that it had a trade meaning or that there was a usage among insurance companies, other than the defendant and their agents in the place where the agency was, that all agents should have the right to solicit and cause policies to be issued according to the published rules of the company and to collect all premiums on renewal thereof, during the time the policy was in force, and that if discharged they were entitled to be paid the present value of commissions calculated by the actuarial rules used to value policies.⁴ It was decided in New York that the agreement on the part of the company to pay commissions on renewal was impliedly conditioned on its ability to renew, and terminated on the company's dissolution.⁵ A contract that the agent shall receive a percentage on the first premiums on policies in a life company and so much on all renewals, is terminated when the company transfers all its business and dissolves.⁶ In Canada it was held where the agent was to get a percentage on the "produit net porté le 31 Décembre, de chaque année," that he could not claim it, where "il reste des réclamations à régler, et que ces réclamations doivent être réduites de cette prétendue balance."⁷ But an agreement by the

¹ *Stagg v. Conn. Mut. L. Ins. Co.*, 1 Ins. L. J. 9 (U. S.).

⁵ *Hepburn v. Montgomery*, 97 N. Y. 617.

² *Spaulding v. N. Y. L. Ins. Co.*, 61 Me. 329.

⁶ *N. C. State L. Ins. Co. v. Williams*, 91 N. C. 69.

³ *Ensworth v. N. Y. L. Ins. Co.*, 1 Big. L. & Ac. Cas. 645 (Oh.).

⁷ *Rawlins v. Cit., Bto., Co.*, 8 Rev. Leg. (Can.) 398.

⁴ *Partridge v. Ins. Co.*, 15 Wall. 573.

directors to continue to the agent, in case of his retirement from the agency, and also after his death, to his family, his commission on policies effected through him in force at his retirement, there being no stipulation that he was to continue in the agency a definite time, or that the commissions should cease if the premiums ceased to be paid, was held *ultra vires* and unreasonable.¹ In *Queen of Spain v. Parr*,² it was held the 10 per cent. discount usually allowed by insurance companies on the punctual payment of the premiums belong, in the absence of agreement to the principal, not to the insurance agent. It has been held if the agent on a cancellation voluntarily returns the money paid by the insured, less commission on earned premiums, on the company's order to the insured, he cannot afterwards recover from the company the commission which he claims should have been retained from the premiums returned.³ Where a general agent is appointed to a specified territory, and there is an agreement as to his and his subagent's compensation, the latter's compensation will be governed by the terms of the agreement, and an agreement with the general agent cannot bestow any greater right.⁴ In *Amer. Steam Boiler Co. v. Anderson*,⁵ the company's agent procured A. to insure, getting from the company the commission agreed on. Subsequently the agent, on the expiration of his contract, induced A. to cancel the policy and insure in another company for which the agent was acting; it was held that the first company could recover from the agent the percentage received by him on the amount of the unearned premium returned by it to A. on the cancellation, as the agent was not justified even after the termination of his agency in defeating the purpose of the contracts of his original company.

127. Where the contract does not give the agent the exclusive right to represent the company, the company may appoint other agents.⁶ The company's right to revoke the agency is, of course, a matter of contract.⁷ But, unless prevented by contract, it may lawfully at any time revoke the agency.⁸ Of course, a contract

¹ *Lewine's Case*, Reilly Alb. Arb. 174.

² 39 L. J. Ch. 73.

³ *Devereux v. Rochester German Ins. Co.* 98 N. C. 6.

⁴ *U. S. L. Ins. Co. v. Hessberg*, 27 Oh. St. 393.

⁵ 130 N. Y. 134.

⁶ *Myers v. Knickerbocker L. Ins. Co.*, 9 Amer. L. R. n. s. 82 (Oh.); *Leater v. N. Y. L. Ins. Co.*, 19 S. W. 356 (Tex.).

⁷ *Ehrlich v. Ætna L. Ins. Co.*, 4 West. R. 37 (Mo.).

⁸ See *Myers v. Knickerbocker L. Ins.*

coupled with an interest cannot be revoked.¹ The fact that an annual license of a foreign company is required by a State's laws, in which it does business, does not necessarily limit the agency to one from year to year of such company within such State, for a certificate that the agency continues is not a new appointment of the agent but a mere requirement of the company.² But the mere fact of designating from year to year, in compliance with the Illinois statute, by the company such persons as its agents on whom legal process could be served, does not imply any agreement to continue the same during the fiscal year, but such agency, in the absence of some other contract, is revocable at will.³ The mere inability in a foreign company to do business in a certain State and the withdrawal of its agencies has been held no excuse for revoking a contract of agency.⁴ Where the business of the company in the State was stopped by an order of court and a receiver was appointed under the State law, it was held to terminate an agency and not to permit the agent to claim on funds in the hands of the receiver for damages.⁵ But where a company covenanted with A. to appoint him with B. in the territory of S., and that if B. should be displaced the company should pay a certain sum to A., a winding up and transfer of business to another company was held a displacement within the contract.⁶ Where the contract is that the agent shall remain for a reasonable time, the question of what a reasonable time is to be determined by the evidence of experts, and is not a matter of law.⁷ The abandonment of the agent to solicit insurance would obviously be a good ground of discharge, but if this be not done, but he be allowed to go on, then this would be a ratification of his power.⁸

128. Where there is a writing as to the contract the court will pass on it,⁹ but a parol agreement set up by the agent, as defend-

Co., 9 Am. Law R., n. s., 82 (Oh.); Mo. 534. See *Sibley v. Mut. Reserve Mut. Ben. L. Ins. Co. v. Charles*, 4 Fund L. Ass'n, 13 S. E. 838 (Ga.).
Ins. L. J. 265 (N. D. Ill.).

¹ *N. C. State L. Ins. Co. v. Williams*, 91 N. Y. 174.
 91 N. C. 69.

² *Scot Commer. Ins. Co. v. Plummer*, 70 Me. 540.

³ *Davis v. Niag. F. Ins. Co.*, 11 Biss. 165 (N. D. Ill.).

⁴ *Lewis v. Atlas Mut. L. Ins. Co.*, 61

⁵ *People v. Globe Mut. L. Ins. Co.*, 91 N. Y. 174.

⁶ *Stirland v. Maitland*, 5 B. & S. 840.

⁷ *Niag. Ins. Co. v. Green*, 11 *Ins. L. J.* 150 (Ind.).

⁸ *Myers v. Knickerbocker L. Ins. Co.*, 9 Amer. L. R. n. s. 82 (Oh.).

⁹ *Kraber v. Un. Ins. Co.*, 129 Pa. St. 8.

ant, modifying the written contract and as a counter-claim is for the jury.¹

129. The good-will of a special agency may be the subject of a sale, and if the general agent is in the habit of allowing his local agents to sell their business, and he represents to them that they may do so, he will be liable if the local agent is deprived arbitrarily of the right of this privilege, but the remedy is simply an action at law for damages.² Probably contracts allowing the agent to dispose of the good-will in the agency, or stipulating for payment of its equitable value, if death should occur during its existence, would be terminated by a defalcation or act of dishonesty on the agent's part.³ But general agents of a foreign company, authorized to appoint local agents and pay them reasonable commissions, cannot bind the company by a contract allowing the local agents to sell the good-will of their business.⁴

130. Frequently bonds with sureties are given for the faithful performance of the agents' duties, and the following cases illustrate some of the principles laid down on questions that have arisen under such contracts. It was held in the House of Lords, that if a principal, suspecting the fidelity of his agent, requires a security, but holds him out as a trustworthy person, the cautioner is not liable.⁵ Though it has been held the company is not guilty of fraud in accepting a bond, and the reappointment of an agent who was in default at the time, if unknown to the company, as they were not bound to examine his accounts.⁶ But in Iowa, where a local agent was reappointed after a prior default, on giving a bond executed at his request with sureties, but he did not inform the sureties of his prior conduct, nor was there any communication made with the general agent or company, the court held the sureties were liable, as the mere acceptance of the bond by the company, without stating the agent's former delinquencies, was not necessarily a fraud on the sure-

¹ *Norddeutscher Feuer Versicherungs Gesellschaft v. Bertheau*, 79 Cal. 495. 15 Fed. R. 312 (N. D. N. Y.). See *Bristol v. Equit. L. Assur. Soc.*, 132 N. Y. 264, as to a sale of a plan of insurance by the agent to the insurer.

² *Barber v. Conn. Mut. L. Ins. Co.*, 15 Fed. R. 312 (N. D. N. Y.).

³ *Phoenix Mut. L. Ins. Co. v. Hol- loway*, 51 Conn. 310.

⁴ *Barber v. Conn. Mut. L. Ins. Co.*,

⁵ *Smith v. Bank*, 1 Dow, 272.

⁶ *Conn. Mut. L. Ins. Co. v. Scott*, 13 Ins. L. J. 272 (Ky.).

ties.¹ Though obviously the sureties would not be bound for a failure of duty subsequent to a discovery of former delinquencies by the company which it failed to communicate.² It is no defence to an action against sureties on a bond for the faithful performance of the agent's duties, that the sureties were ignorant of the extent of the obligation assumed, unless there be fraud, for it is the duty of the surety to ascertain his obligation for himself.³

The liability on the bond depends solely on the contract, and will not be enlarged. Thus the bond of an agent who has assumed the indebtedness of a former agent for uncollected premiums will not cover the debt, but only the amount of the premiums if collected.⁴ Where the sureties agreed in the bond that the agent was to conduct the business alone, an assumed partnership is a breach, and advertisements and the assumption of a firm name are evidence of a partnership which the company is bound to notice.⁵ It was held an agent's bond covers moneys collected by him within his district on policies issued independently of him, as well as unearned premiums returned by the company on cancelled policies and remitted to be paid back to the insured.⁶ Under a general bond a general agent was held liable for that portion of deficit caused by the failure of his subagents to pay over to him moneys they had received, as a general agent ordinarily transacts business by means of subagents.⁷ Where there is no period for the duration of the agency fixed in the bond, the latter is good so long as the agent is continued in office.⁸ It was held in the Federal Court in Indiana that it was not essential to the validity of a bond of an agent of a foreign company, that he should previously have filed the papers required by the statute in the proper county office, nor that the agency should be established in any particular county after the auditor had granted the certificate to do business.⁹ But it was held the statute of Pennsyl-

¹ *Home Ins. Co. v. Holwell*, 11 Ins. L. J. 162 (Iowa).

² *Conn. Mut. L. Ins. Co. v. Scott*, 13 Ins. L. J. 272 (Ky.).

³ *Phoenix Mut. L. Ins. Co. v. Hollaway*, 51 Conn. 310.

⁴ *Ball v. Watertown F. Ins. Co.*, 44 Mich. 137.

⁵ *Conn. Mut. L. Ins. Co. v. Scott*, 13 Ins. L. J. 272 (Ky.).

⁶ *Ball v. Watertown F. Ins. Co.*, 44 Mich. 137.

⁷ *Phoenix Mut. L. Ins. Co. v. Hollaway*, 51 Conn. 310.

⁸ *Scot. Commer. Ins. Co. v. Plummer*, 70 Me. 540.

⁹ *U. S. L. Ins. Co. v. Adams*, 7 Biss. 30 (D. Ind.).

vania precluded a suit on the agent's bond by a foreign company which had not complied with the statute;¹ and further that the certificate of the auditor-general, after the termination of the agency, that the agent had been qualified, but not stating the time when the appointment was certified to him nor referring to any record made at the time, is not conclusive.² Where a non-compliance with the State statutes is set up to defeat a suit on a bond the burden is on the party setting it up.³ Where the bond stipulated that the laws of another State should govern, but there was not shown any difference between the laws of that and the domestic State, the latter will be followed.⁴

131. Different interests may be joined in the same policy.⁵ Although the exact nature of the interest need not be stated unless requested, yet a sufficient description of the subject-matter is required both from the nature of the contract and by the universal practice of insurers.⁶ In all cases where the peculiar nature of the interest alters the character of the risk, it may be properly said that such interest forms the subject-matter of the insurance, and, at all events, there is great force in the argument that the nature of that interest should be stated.⁷ Thus, for instance, if "profits" are the subject of insurance, they should be described as such.⁸

¹ *Thorne v. Travellers' Ins. Co.*, 80 Pa. St. 15.

² *Ib.*

³ *Scot. Commer. Ins. Co. v. Plummer*, 70 Me. 540.

⁴ *Ib.*

⁵ *McCormick v. Ferrier, H. & J. (Ir.)* 12; *Castner v. Farmers' Mut. F. Ins. Co.*, 46 Mich. 15; *Richmond, Etc., F. Ins. Co.*, 14 Q. L. R. 293, 435; *Car-ruthers v. Sheddon*, 6 Taunt. 14; *Cu-sack v. Mut. Ins. Co.*, 6 L. Can. J. 97; *Whyte v. Home Ins. Co.*, 14 Ib. 301; *Norwich F. Ins. Co. v. Boomer*, 52 Ill. 442; *Bartlet v. Walter*, 13 Mass. 266; *Castner v. Farmers' Mut. F. Ins. Co.*, 46 Mich. 15; *Barracliff v. Trade Ins. Co.*, 13 Ins. L. J. 190 (N. J.); *S. C.* 45 N. J. L. 543; *Miller v. Eagle L. & Health Ins. Co.*, 2 R. D. Sm. (N. Y.) 268; *Brown v. Springfield, F. & M. Ins.*

Co., 1 Ins. L. J. 57 (N. Y.); *Riggs v. Commer. Mut. Ins. Co.*, 125 N. Y. 7; *Cross v. Nat. F. Ins. Co.*, 132 Ib. 133; *White v. Hudson River Ins. Co.*, 7 How. Pr. (N. Y.) 341; *Wells v. Phila. Ins. Co.*, 9 S. & R. (Pa.) 103; *Ætna Ins. Co. v. Miers*, 5 Sneed (Tenn.), 139.

⁶ See *Harman v. Kingston*, 3 Camp, 150; *Crowley v. Cohen*, 3 B. & Ad. 478; Remarks of Blackburn, J., in *Mackenzie v. Whitworth*, 1 Exch. D., p. 40; *Clarke v. Firemen's Ins. Co.*, 18 La. 431; *Clark v. Dwelling-House Ins. Co.*, 81 Me. 373.

⁷ Remarks of Blackburn, J., in *Mackenzie v. Whitworth*, 1 Exch. D., p. 40.

⁸ See *Mackenzie v. Whitworth*, *supra*; *Lucena v. Crauford*, 2 B. & P. (N. R.) 269; *Menzies v. North Brit. Ins. Co.*, 19 Scot. Jur. 291.

132. The Act of 14 Geo. III., c. 48,¹ requiring the insertion of the names of the parties interested or for whose benefit the policy was taken, was not merely directed against wager policies, but applied to all.² A policy granted to one in trust for another, where both names appear on the face of the instrument as "Mrs. A. B. by C. D., her Trustee," is valid under the Act.³ Where a policy was effected by the husband, for the benefit of a surety, on the life of his wife, who was entitled to a legacy on attaining her majority, which had been advanced by the trustees of the will to the husband on his obtaining a surety for repayment in the event of the wife's dying under the age of twenty-one, it was held that as the husband was primarily interested his name should have been inserted under the Act.⁴ So where the policy recited, the plaintiffs had proposed to insure the joint lives of A. and wife, and delivered to the company a written declaration which was the basis of the contract, and by a declaration of trust the plaintiffs covenanted in case of the death of either A. or his wife they should hold the insurance for the survivor and for their children, it was held the policy was illegal under the above Act, as the names of the interested parties had not been inserted as such, and the declaration of trust showing that the plaintiff had no interest could not be incorporated as part of the policy.⁵ The insertion of the name of the broker effecting a policy as "agent" is a sufficient compliance with the Act of 28 Geo. III., c. 56, avoiding blank policies and requiring the name of the person interested or giving the order, etc.⁶ And where A.'s name was inserted "as agent," who was in point of fact truly interested, it was sufficient, though the policy had been taken out by some one else for his behoof, and the designation "as agent" was erroneous or incomplete.⁷ In Wisconsin the laws of 1879⁸ make it incumbent on a

¹ Section 2. "It shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons' name or names interested therein, or for whose use, benefit, or on whose account such policy was so made or underwrote."

² *Hodson v. Observer L. Assur. Co.*, 8 E. & B. 40.

³ *Collett v. Morrison*, 9 Hare, 162.

⁴ *Rvans v. Bignold*, L. R. 4 Q. B. 622.

⁵ *Dowker v. Can. L. Assur. Co.*, 24 U. C. Q. B. 591.

⁶ *Bell v. Gilson*, 1 B. & P. 345.

⁷ *Symers v. Glasgow M. Ins. Co.*, 19 Scot. Jur. 49.

⁸ Sess. L. 1872, p. 86.

life company to show distinctly by their policies the amount of life benefits, and to make their premiums fixed and not contingent on losses.¹

133. Where the insurer is a corporation the policy is usually sealed with the corporate seal. In England the rule was stated to be that a trading company, while acting within the scope of its charter and powers, may enter into the usual contracts in such business in the ordinary manner, and be bound by a contract not under seal.² An English company completely registered under the Joint Stock Companies' Act³ is bound by a contract by a competent body of directors not under seal, the 44th section providing "that in the absence of such requisites (a seal and other requisites) or any of them, such contract shall be void and ineffectual, except as against the company on whose behalf the same shall have been made," though, perhaps, it could not enforce such obligations.⁴ Where the deed of settlement authorized the directors to insure as they thought best, and provided that the policy or other instrument should be signed by at least three directors and sealed with the common seal, an unsealed memorandum signed by three directors, that on the payment of certain premiums the society would guaranty an insurance and issue a stamped policy, it was held authorized and binding.⁵ In Missouri, an unsealed policy by a corporation was held valid, as the defence did not set up any provisions in the charter avoiding the contract not under seal.⁶ And it was held in Ohio, that the old rule that a corporation can only make a binding contract by attaching its seal is not now in force, but that a sealed policy may be modified by a written stipulation.⁷ In Canada, where the attestation clause stated the seal had been affixed, though in fact it was omitted, it was held a binding contract, or in any event might be rectified as a mutual mistake.⁸ So where the statute provided that "no contract shall be valid unless made under seal

¹ *Nat. L. Ins. Co. v. State Commissioner*, 25 Mich. 321.

² See *Governor of Copper Mines v. Fox*, 3 Eng. L. & Eq. 420.

³ 7 & 8 Vict., c. 110.

⁴ *Ridley v. Plymouth, Etc., Co.*, 2 Exch. 712.

⁵ *Re Athenæum L. Assur. Soc.*, 4 K. & J. 549.

⁶ *Nat. Bank & Ins. Co. v. Knaup*, 55 Mo. 154. See *Lindauer v. Del. Mut. Safety Ins. Co.*, 13 Ark. 461.

⁷ *Gates v. Home Mut. L. Ins. Co.*, 4 Amer. L. Rec. 395.

⁸ *Wright v. Sun Mut. L. Ins. Co.*, 5 Ont. Ap. 218.

except the interim receipt," the same principle was held under the same circumstances, Patterson, J., observing that the policy if necessary could be construed as an interim receipt.¹

134. Where the insurance is effected through the medium of an agent, the company, in forwarding him the policy, to deliver to the insured, frequently provides in it that it shall not be binding till countersigned by such agent, and the performance of this condition is precedent to a recovery.² Though it has been held, the agent's countersigning is only ministerial, as he is not authorized to refuse to do so except for non-payment of a premium, and that the delivery without countersigning is valid.³ But it has been held the countersigning only refers to the formation of the original contract, and therefore a duly countersigned policy may subsequently be added to or altered by a parol agreement.⁴ The appointment of a local agent by a general agency with power to countersign was held valid where the appointment was only by one member of the general agent firm.⁵ A policy countersigned "A. agent per B." has been held sufficient to put the insured on inquiry as to the authority of B.⁶ Where such a provision exists, a policy in Massachusetts in the absence of such countersigning was held invalid, though the agent retained it and was himself the insured.⁷ But in Connecticut apparently a contrary rule exists.⁸

135. The charters of beneficial societies not unusually provide that the societies shall formulate rules as to the formation of contracts and the issuing of policies. Where a charter of a mutual association authorized the payment of a sum to the insured, provided he "has complied with its lawful requirements," it may make any lawful requirements.⁹ And where the society has established a particular

¹ Wright v. Sun Mut. L. Ins. Co., 5 Ont. Ap. 218.

⁵ Bowman v. U. S. Casualty Co., cited Bliss on Ins., § 311.

² Peoria M. & F. Ins. Co. v. Walser, 22 Ind. 73; Lynn v. Burgoyne, 13 B. Mon. (Ky.) 400; Hardie v. St. Louis Mut. L. Ins. Co., 26 La. An. 242; Noyes v. Phoenix Mut. L. Ins. Co., 1 Mo. Ap. 584.

⁶ McClure v. Miss. Val. Ins. Co., 4 Mo. Ap. 148. See Continen. L. Ins. Co. v. Goodall, 3 Amer. L. Rec. 338 (Oh.).

⁷ Badger v. Amer. Popular L. Ins. Co., 103 Mass. 244.

³ Whitcomb v. Phoenix Mut. L. Ins. Co., 8 Ins. L. J. 624 (D. Mass.).

⁸ Norton v. Phoenix Mut. L. Ins. Co., 35 Conn. 503.

⁴ Kennebec Co. v. Augusta Ins. & Banking Co., 6 Gray (Mass.), 204.

⁹ Coleman v. Supreme Lodge, 14 Ins. L. J. 635 (Mo.).

method by which beneficiaries may be nominated or appointed, this method excludes all others, and unless the beneficiary is so nominated he will not take the benefit.¹ Thus, where a certificate was payable to the member's "family or as he may direct" by will or entry in the reporter's book, or on the face of the certificate, and he indorsed on the certificate, directed to the officers of the society: "It is my will that the benefit from the within certificate be paid to my sister," it was held this was sufficient, and delivery to the sister was not necessary, as it was not a contract with her.² In *Urquhart v. Butterfield*,³ a fund was established by statute⁴ for the widows, children, relatives, and nominees of officers or persons belonging to the department of customs in England, and the directors were allowed to admit any person not being a relative as a nominee. One of the rules provided that the sum insured by any subscriber, together with any addition of profit from time to time be made thereto, should in its disposal be available as the subscriber may think proper and direct in his will, etc. The subscriber made a will, but made no mention of this fund, and subsequently became a lunatic. The curator who proved his will was nominated on petition by the court's order as "nominee" of the lunatic, for behoof of the legatees under the will as to the subscriber's interest in this fund, and the directors admitted that the order had the same effect as if the subscriber had while sane nominated. Held, in appointing the nominee of a subscriber's interest the directors ought to be informed for what purpose he is appointed and to whom the money is to be paid, which may be done by the instrument appointing the nominee, or by some other instrument signed by the subscriber or *by his* will; and the order was a sufficient nomination, and a de-

Highland v. Highland, 109 Ill. 108; *Elliott v. Whetherbee*, 94 N. C. 115; *Eastman v. Prov. Mut. Relief Ass'n*, 14 Ins. L. J. 858 (N. H.); *Sanger v. Rothschild*, 123 N. Y. 577; *Ireland v. Ireland*, 42 Hun (N. Y.), 212; *Bishop v. Grand Lodge*, 43 Hun (N. Y.), 472; *Hotel-Men's Mut. Ben. Ass'n v. Brown*, 33 Fed. R. 11 (N. D. Ill.); *Worley v. Northw. Masonic Aid Ass'n*, 3 McCrary, 53 (D. Iowa).
¹ *Highland v. Ib.* 109 Ill. 366.
² 37 Ch. D. 357.
³ Act of Geo. III., c. 73.

claration of the persons for whose benefit the sum insured was to be paid, and the directors must pay him. In *Re Pocock's Policy*,¹ in the same society, one of the rules provided that one-third of the portion payable on the death of a subscriber should be set aside for his widow, and that the remaining two-thirds or the whole, if he left no widow, "should be applied or paid in any manner or proportion which he might propose for the benefit of his widow, children, or relatives or his nominees, who should have been duly admitted by the directors." A subscriber, a widower, on the marriage of his daughter, sent in as nominees the trustees of her marriage settlement, and directed the trusts to be for his daughter for life, with remainder for her husband for life, with remainder for their issue; but neither the trustees nor the husband were formally admitted. The daughter predeceased her father, and on his death the money being paid into court, it was held by the vice-chancellor that the trustees were the proper nominees, who, not having been objected to, must be held sufficiently admitted; and on appeal, that the settlement on the husband and issue was a valid application of the fund "for the benefit of his daughter" within the rules, but that no admission of nominees nor the consent of the directors was necessary. Where the order of appointment must be in writing and signed by two witnesses before a justice of the peace, an ordinary will is sufficient.²

136. In a lower Court in New York it appeared that there was a certificate to A., which contained a provision that payments that shall accrue "to heirs of the person insured . . . will be payable to ——— or ——— ——— lawful heirs," the blanks not being filled, but a will was found giving it to his wife and children, and the will was held a sufficient designation, as the blank form was never filled up.³ Where the insured, being required to sign an application, sent it to an agent, who rewrote it without the insured's knowledge and took a policy in another company, for which he was also agent, and paid thereon several premiums, it was held no defence to say the insured had not signed the application as required by the rules.⁴ If the husband makes a proposal for his wife in her

¹ 6 Ch. Ap. 445.

⁴ *Bohringer v. Empire Mut. L. Ins.*

² *Mellows v. Ib.*, 61 N. H. 137.

Co., 2 T. & C. (N. Y.) 610.

³ *Hannigan v. Ingraham*, 55 Hun (N. Y.), 257.

absence, signs with the consent of the company's agent and the wife ratifies, it binds.¹ Where the method of nomination required by the society is not followed, and it does not agree to pay the insured, his heirs, etc., the benefit frequently reverts to the society. Thus, where the certificate of a benevolent society in New Hampshire recited that on production of certificate and notice of death a benefit would be paid to such a one as the member on the books of the company or on the face of the certificate may have directed, provided he be in good standing, but no one had been directed, it was held his administrator could not recover, as the contract was not with the member, his heirs and assigns.² But in *Palmer v. Welch*,³ where the laws provided the policy should be payable, first, to wife, children, grandchildren, father, mother, brother, sister, or grandparents; secondly, to dependents; and it was provided that if the dependency of a beneficiary of this class did not exist at the death, then the first class in order should take, it was held they would take in such an event, though they were not mentioned as beneficiaries in the certificate. Where a society agreed to pay the member's devisees, on an intestacy, his administrator could not take;⁴ and parol evidence is not admissible to show whom the member had intended to appoint.⁵ Where a certificate was stated to be for "friends," but if no beneficiaries then for his heirs, it was held an administrator, who had been substituted for "friends," could sue for "heirs" as "friends," and that though invalid, it did not avoid the whole contract, and a recovery for the "heirs" lay.⁶

137. As has been stated, a preliminary contract is frequently made between the applicant and the insurer's agent which is intended to bind till the application is finally made or passed upon by the principal.⁷ If such a contract is accepted, the terms of the policy must of course strictly correspond with the interim receipt.⁸ When such a temporary insurance is made by a note or receipt, it

¹ *Somers v. Kan. Protective Un.*, 42 Kan. 619.

² *Rastman v. Prov. Mut. Relf. Ass'n*, 14 Ins. L. J. 858 (N. H.).

³ 132 Ill. 141.

⁴ *Worley v. Northw. Masonic Aid Ass'n*, 3 McCrary, 53 (D. Iowa).

⁵ *Eastman v. Prov. Mut. Relf. Ass'n*, 14 Ins. L. J. 858 (N. H.).

⁶ *Rindge v. New Eng. Aid Soc.*, 146 Mass. 286. See also *Bishop v. Grand Lodge*, 43 Hun (N. Y.), 472.

⁷ See *ante*, § 116.

⁸ *Wyld v. Liv. & Lond. & Globe Ins. Co.*, 23 Grant Ch. (Can.) 442. See *ante*, § 116.

is presumed that the policy to be issued will be subject to conditions usual in such cases, and the slip or note, therefore, would be theoretically also subject to them.¹ It was held by the Privy Council that an interim receipt or note is not a policy within the meaning of the terms of the Ontario Act; and that "subject to all the usual terms and conditions of this company" in such a paper meant that such conditions ought to be read into the interim contract to the extent to which they may lawfully be made a part of the policy, when issued by following the directions of the statute, subject always to the statutable conditions that they should be held to be just and reasonable by a Court or Judge.² It was held in Canada, in *Kelly v. Isolated Risk and Farmers' F. Insurance Co.*,³ an interim receipt not being under seal could not be sued upon.

138. A policy is not a necessary element of the contract, but is the usual instrument in which the terms are contained.⁴ And no particular form of contract is essential, but it may be evidenced by a policy, or a memorandum or note;⁵ or, unless there is some statutory enactment to the contrary, it may be simply verbal.⁶ In Eng-

¹ See *DeGrove v. Metropolitan Ins. Brit. Ins. Co.*, 3 C. S. C. (1st Ser.) 519; *Co. 61* (N. Y.), 594; *Lipman v. Niag. F. Ins. Co.*, 121 Ib. 454; *Hawker v. Niag. Dist. Mut. F. Ins. Co.*, 23 *Grant Ch. (Can.)* 139.

² *Cit. Ins. Co. v. Parsons*, 7 Ap. Cas. 96. See *Parsons v. Queen Ins. Co.*, 29 U. C. C. P. 188; *Compton v. Mercant. Ins. Co.*, 27 U. C., Ch. 334.

³ 26 U. C. C. P. 299.

⁴ *New Eng. F. & M. Ins. Co. v. Robinson*, 25 Ind. 536; *Successors of Hearing*, 26 La. An. 326; *Trustees First Baptist Church v. Brooklyn F. Ins. Co.*, 19 N. Y. 305.

⁵ See *M. Mut. Ins. Ass'n v. Young*, 43 L. T. r. s. 441; *Newman v. Belsten*, 76 L. T. r. s. 228; *Amer. Horse Ins. Co. v. Patterson*, 28 Ind. 17; *Goodall v. New Eng. Mut. F. Ins. Co.*, 25 N. H. 169; *State F. & M. Ins. Co. v. Porter*, 3 *Grant Cas. (Pa.)* 123; *O'Conner v. Imperial Ins. Co.*, 14 L. Can. J. 219.

⁶ See *Kaines v. Knightly*, *Skinner* (34 Car. II.) 54. See *Christie v. North*

Mobile M. Dock & Mut. Ins. Co. v. Mo-Millin, 31 Ala. 711; *Ala. Gold L. Ins. Co. v. Mayes*, 61 Ala. 163; *Home Ins. Co. v. Adler*, 71 Ala. 516; *Bishop v. Clay F. & M. Ins. Co.*, 49 Conn. 167; *People's Ins. Co. v. Paddon*, 8 Brad. (Ill.) 447; *New Eng. F. & M. Ins. Co. v. Robinson*, 25 Ind. 536; *Commercial Un. Assur. Co. v. State*, 113 Ind. 331; *City of Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa, 276; *Western Mass. Ins. Co. v. Duffey*, 2 Kan., p. 355; *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285; *Sanborn v. Firemen's Ins. Co.*, 16 Gray (Mass.), 448; a usage to show a parol contract was held inadmissible in *Emery v. Boston M. Ins. Co.*, 14 Ins. L. J. 427 (Mass.); *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143; *Fleming v. Hart. Ins. Co.* 42 Mich. 616; *Roger Williams Ins. Co. v. Carrington*, 43 Mich. 252; *Ganser v. Fireman's Fund Ins. Co.*, 38 Minn. 74; *Plahter v. Merch. & Mfr's Ins. Co.*, 38 Mo. 284; modified by *Henning*

land during the period of the monopolies engaged in by the Royal Exchange and the London Assurance Companies, by virtue of the statutes of 6 Geo. I., it was not unusual for, and there was nothing to prevent, mutual insurance associations or clubs from mutually insuring ships belonging to their members, either with or without policies. In many of these associations no policy was used. The passage of the Stamp Act of 35 Geo. III.¹ raised the question whether an agreement for the insurance of ships could be valid unless a duly stamped policy was executed. In *Bromley v. Williams*,² the Master of the Rolls appears to have considered that no policy was necessary. In the case, however, of the London M. Assur. Ass'n,³ the contrary was held. To prevent all doubt upon the subject the Stamp Act of 30 Vict.⁴ was passed, to the effect that "no contract or agreement for sea insurances shall be valid unless the same is expressed in a policy," etc. The Act of 6 Geo. I. was, however, held not to extend to Scotland, at least as to the prohibition as to sea insurance except by the above named two English companies; and an action for failure to issue a marine policy according to a written agreement made in Scotland was held to lie.⁵ Indeed it is not uncommon for mutual associations in England to carry on their

v. U. S. Ins. Co., 47 Mo. 425, and *Baile v. St. Joseph F. & M. Ins. Co.*, 73 Mo. 371; modifying or disapproving the preceding case, also *Hening v. U. S. Ins. Co.*, 2 Dill. 26 (D. Mo.), where the Federal Court declined to be bound by the ruling of the State Court, and held the contract might be verbal: *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. Ap. 252; *Trustees First Baptist Church v. Brooklyn F. Ins. Co.*, 19 N. Y. 305; *Cooke v. Ætna Ins. Co.*, 7 Daly (N. Y.), 555; *Kelly v. Commw. Ins. Co.*, 10 Bos. (N. Y.) 82; *Solmes v. Rutgers F. Ins. Co.*, 3 Keys (N. Y.), 416. In Ohio it was held in *Cockerill v. Cincinnati Ins. Co.*, 16 Oh. 148, that a verbal contract was bad, but this was overruled in *Amazon Ins. Co. v. Wall*, 31 Oh. St. 633. In Pennsylvania the validity of a verbal contract was questioned in *Smith v. Odlin*, 4 Yeates (Pa.), 468; but later in *Hamilton v. Lycom. Mut. Ins. Co.*, 5 Pa. St. 339, the validity of such a contract was recognized: *Blake v. Hambury Bremen Ins. Co.*, 13 Ins. L. J. 151 (Texas); *Ætna Ins. Co. v. Northw. Iron Co.*, 21 Wis. 458; *Northw. Iron Co. v. Ætna Ins. Co.*, 26 Wis. 78; *Campbell v. Amer. F. Ins. Co.*, 73 Wis. 100; *Zell v. Herman Farmers' Mut. Ins. Co.*, 75 Wis. 521; *Mathers v. Un. Mut. Acc. Ass'n*, 78 Wis. 588; *Relief F. Ins. Co. v. Shaw*, 94 U. S. 574, on appeal from District of Massachusetts.

¹ C. 63.

² 32 Beav. 177.

³ 4 Ch. Ap. 611.

⁴ C. 23, § 7.

⁵ *Albion F. & L. Ins. Co. v. Mills*, 3 Wil. & Shaw, 218. See *Christie v. North Brit. Ins. Co.*, 3 C. S. C. (1st Ser.) 519.

business without the issue of policies; and, for example, formerly the English mutual marine associations frequently made their contracts by the printed rules of the association, and the entering his ship by a member.¹ So in the United States mutual associations, which proceed upon the plan of assessments to meet their liabilities, for instance, frequently issue no policies, and the constitution and laws stand in the place of a contract, which determine the mutual rights and obligations of the parties.² The agreement to pay the premium is a sufficient consideration to support a verbal contract.³ While provisions in the charters of companies are often found, such as, "That all policies and contracts of insurance which may be made or entered into by said corporation shall be subscribed by the president pro tem., signed and attested by the secretary, and being so signed and attested shall be binding and obligatory on the said corporations without the seal thereof;" or provisions empowering or directing certain officers to sign, etc., contracts or policies, these have been usually held not to apply to executory agreements to insure, but only to executed contracts.⁴ And a parol executory agreement to issue a policy will be enforced, either at law in a suit for breach of contract to issue a policy, or by specific performance in equity.⁵ In Alabama there exists no statute which

¹ *M. Mut. Ass'n v. Young*, 43 L. T. R. S. 441. criticising *Henning v. U. S. Ins. Co.*, 47 Mo. 425. Also *Hening v. U. S. Ins. Co.*, 2 Dillon, 26 (D. Mo.).

² *Miles v. Rebstock*, 29 Minn. 380. See *Greeno v. Greeno*, 23 Hun (N. Y.), 478.

³ *Fitton v. F. Ins. Co. Ass'n*, 20 Fed. R. 766 (D. Vt.).

⁴ *Security F. Ins. v. Ky. M. & F. Ins. Co.*, 7 Bush. (Ky.) 81; *Trustees First Baptist Church v. Brooklyn F. Ins. Co.*, 19 N. Y. 305. See *Cooke v. Ætna Ins. Co.*, 7 Daly (N. Y.), 555; *Commerce Mut. M. Ins. Co. v. Un. Mut. Ins. Co.*, 19 How. 318; *Franklin F. Ins. Co. v. Colt*, 20 Wall. 560. See also *Dayton Ins. Co. v. Kelly*, 24 Oh. St. 345; *Amazon Ins. Co. v. Wall*, 31 Oh. St. 633; *Allegheny Ins. Co. v. Hanlon*, 31 Leg. Int. (Pa.) 372; *New Eng. F. & M. Ins. Co. v. Robinson*, 25 Ind. 536; *Baile v. St. Joseph F. & M. Ins. Co.*, 73 Mo. 371,

⁵ *Mobile M. Dock & Mut. Ins. Co. v. McMillan*, 31 Ala. 711; *Ala. Gold L. Ins. Co. v. Mayes*, 61 Ala. 163; *Home Ins. Co. v. Adler*, 71 Ala. 516; *Gold v. Sun Ins. Co.*, 73 Cal. 216; *Bishop v. Clay F. & M. Ins. Co.*, 49 Conn. 167; *New Eng. F. & M. Ins. Co. v. Robinson*, 25 Ind. 536; *City of Daveuport v. Peoria M. & F. Ins. Co.*, 17 Iowa, 276; *Security F. Ins. Co. v. Ky. M. & F. Ins. Co.*, 7 Bush. (Ky.) 81; *Phoenix Ins. Co. v. Ryland*, 69 Md. 437; *Post v. Ætna Ins. Co.*, 43 Barb. (N. Y.) 351; *Sandford v. Trust F. Ins. Co.*, 11 Paige Ch. (N. Y.) 547; *Van Loan v. Farmers' Mut. F. Ins. Ass'n*, 90 N. Y. 280; *Kelly v. Commw. Ins. Co.*, 10 Bos. (N. Y.) 82; *Trustees First Baptist Church v. Brook-*

effects an executed verbal contract of insurance.¹ Though in Georgia by the provisions of the Code, section 2794, the contract must be written.² But in equity the Court will grant relief if the complainant has so acted on a parol contract that it would be a fraud to permit the other side to repudiate.³ In Kentucky a verbal contract is valid.⁴ In Maine a contract of insurance for one year, as it may be performed within that time, is not within the Statute of Frauds; nor is a verbal contract prohibited by the Revised Statutes, c. 49, sections 12, 14.⁵ In Massachusetts, an oral agreement for a year including its rate was likewise held not to be within the fifth clause of the Revised Statutes, c. 74, section 1.⁶ In Michigan there is no statute against verbal contracts.⁷ In Minnesota a parol contract of insurance for three years, was held valid, as it was to commence within the year, and the contingency might happen within that time.⁸ It was also held in New York that an agreement to renew on a policy from year to year was not within the Statute of Frauds, 2 R. S. 135, sec. 2, because, while it may not be performed within the year, yet if it can be so performed and does not necessarily endure longer, it does not fall within its meaning.⁹ In Canada it was held that to recover on a contract of insurance by a corporation there must be a sealed policy, and, therefore, a parol contract for insurance by an incorporated company cannot be sued on at law,

lyn F. Ins. Co., 19 N.Y. 305. In *Dayton Ins. Co. v. Keppy*, 24 Oh. St. 345, a clause in the charter directing certain officers to sign "all policies or contracts" was said to be sufficient to avoid a verbal contract, had there not been another clause empowering the body to act generally for the objects for which it was incorporated, but see *Amazon Ins. Co. v. Wall*, 31 Oh. St. 33. See also *Allegheny Ins. Co. v. Hanlon*, 31 Leg. Int. (Pa.) 372, which is very "dryly" reported and difficult to criticise; *Commer. Mut. Ins. Co. v. Un. Mut. Ins. Co.*, 19 How. 318; *Franklin F. Ins. Co. v. Colt*, 20 Wall. 560; *Jones v. Provincial Ins. Co.*, 16 U. C. Q. B. 477.

¹ *Mobile M. Dock Mut. Ins. Co. v. McMillon*, 31 Ala. 711.

² *Simonton v. Liv. & Lond. & Globe Ins. Co.*, 51 Ga. 76; *Clark v. Brand*, 62 Ga. 23.

³ *Simonton v. Liv. & Lond. & Globe Ins. Co.*, 51 Ga. 76.

⁴ *Security F. Ins. Co. v. Ky. M. & F. Ins. Co.*, 7 Bush (Ky.), 81.

⁵ *Walker v. Metropolitan Ins. Co.*, 56 Me. 371.

⁶ *Sanborn v. Firemen's Ins. Co.*, 16 Gray (Mass.), 448.

⁷ *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143; *Roger Williams Ins. Co. v. Carrington*, 43 Mich. 252.

⁸ *Wiebeler v. Milwaukee Mechan. Mut. Ins. Co.*, 30 Minn. 464.

⁹ *Trustees First Baptist Church v. Brooklyn F. Ins. Co.*, 19 N.Y. 305.

though the plaintiff may sue for a breach to deliver a policy, or proceed in equity.¹ Where there are no stipulations to the contrary, a verbal or written contract may be altered by parol.²

139. Where there is an executory agreement to issue a policy, it will be presumed that the policy was to contain the company's usual conditions.³ Thus, where a broker, familiar with the company's rates, applied for a policy and the insurer credited him, but did not issue a policy, the usual rates were held to apply.⁴ Though the refusal to issue a policy on an oral agreement was held to waive any condition precedent it might have contained.⁵ Where the duration of the risk on a parol contract was at issue the insurer's agent cannot state that had the question of duration been raised at the formation of the contract he would have charged a higher rate for the term alleged.⁶ If the underwriter insists on a particular condition in the subsequent policy that is unusual, he must show it was agreed on in the oral contract;⁷ and the burden is on the insurer to show that a particular condition in similar policies is usual.⁸ So, on the other hand, a condition which the parties agreed upon in favor of the insured must appear in the subsequent policy.⁹ But proof of a custom that ten or twelve insurance companies were in the habit of inserting a particular clause is not evidence, in a suit against the insurer on the part of the insured, who refused to accept

¹ *Jones v. Provincial Ins. Co.*, 16 U. C. Q. B. 477. See also *Montreal Assur. Co. v. McGillivray*, 2 L. Can. J. 221; but *quere* same case on appeal, 13 Moore P. C. C. 87; *Frost v. Liv. & Lond. & Globe Ins. Co.*, *Stev. Dig. (N. B.)* 738.

² *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143; *Roger Williams Ins. Co. v. Carrington*, 43 Ib. 252; *Kennebec Co. v. Augusta Ins. Co.*, 6 Gray (Mass.), 204; *Trustees First Baptist Church v. Brooklyn F. Ins. Co.*, 19 N. Y. 305.

³ *Daly v. Nat. L. Ins. Co.*, 64 Ind. 1; *Smith v. State Ins. Co.*, 64 Iowa, 716; *Home Ins. Co. v. Favorite*, 46 Ill. 263; *Salisbury v. Hekla F. Ins. Co.*, 32 Minn. 458; *Van Loan v. Farmers' Mut. F. Ins. Ass'n*, 90 N. Y. 280; *State*

F. & M. Ins. Co. v. Porter, 3 Grant (Pa.), 123; *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256. See also *Ansley v. Watertown Ins. Co.*, 14 Q. L. R. 183.

⁴ *Train v. Holland Purchase Ins. Co.*, 62 N. Y. 598. See also *Walker v. Metropolitan Ins. Co.*, 56 Me. 371.

⁵ *New Eng. F. & M. Ins. Co. v. Robinson*, 25 Ind. 536.

⁶ *Mobile & M. Dock & Mut. Ins. Co. v. McMullan*, 31 Ala. 711.

⁷ *Salisbury v. Hekla F. Ins. Co.*, 32 Minn. 458.

⁸ *Ib.*

⁹ *N. Y. L. Ins. Co. v. Rohrbongh*, 14 Ins. L. J. 60 (Tex.).

a policy, alleging that the agent stated it should contain the clause in point.¹ There appears to be no reason why an application should not when written be drawn in lead-pencil.²

¹ Amer. Ins. Co. v. Neiberger, 74 Mo. 167.

² City Ins. Co. v. Bricker, 91 Pa. St. 488.

CHAPTER III.

THE MUTUAL ASSENT.

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140. In contracts of insurance, as in all other contracts, there must be a mutual assent of the parties as to its component parts before an action will lie for breach of contract.¹ A mere direction to insure or a mere understanding to that effect is not sufficient.² No particular form of assent is essential. It may be written or verbal, or may arise without any words at all from mere silence, a sign, or

¹ *People's Ins. Co. v. Paddon*, 8 Brad. (Ill.) 447; *Alliance M. Assur. Co. v. La. State Ins. Co.*, 8 La. 1; *Sun Mut. L. Ins. Co. v. Beland*, 5 Chic. L. N. 42 (Ill.); *Faughner v. Mfra. Mut. F. Ins. Co.*, 86 Mich. 536; *Wallingford v. Home Mut.*

F. & M. Ins. Co., 30 Mo. 46; *Conn. Mut. L. Ins. Co. v. Rudolph*, 45 Tex. 454.

² *Arkansas Ins. Co. v. Bostick*, 27 Ark. 539; *Ins. Co. v. Lyman*, 15 Wall. 664; *People's Ins. Co. v. Paddon*, 8 Brad. (Ill.) 447.

the conduct of the parties.¹ But the minds must meet at some instant of time,² though it is not necessary that either party should be aware of the time when the meeting occurred.³

141. Where the contract is made by correspondence, and the proposer uses the mail, he is bound from the time of posting the letter, unless he stipulates otherwise.⁴ And if the proposer uses the mail, the acceptor may, in the absence of any directions to the contrary, use it too.⁵ But where any particular method of the conveyance of the answer is required, it should be observed.⁶ So if the place to which the answer should be sent is stated, it should be observed.⁷ When a negotiation has been carried on through the mail, an acceptance, which can be so sent, when put into the post office completes the contract.⁸ It is immaterial whether the letter reaches its destination or not,⁹ as the acceptor is not responsible for the casualties of the post office.¹⁰ The opinion of Vredenburg, J., in *Hallock v. Commer. Ins. Co.*,¹¹ very clearly illustrates this point. He said, at page 272: "First comes the mental resolve to accept the proposition, but the law can only recognize an overt act, whether that act be a word spoken, a lithographic sign, or a letter mailed; some interval of time, more or less appreciable, must intervene between the doing of the act and its coming to the knowledge of the party to whom it is addressed. In the meantime what is the condition of affairs? Is it a contract or no contract? If the bidder does not see the auctioneer's hammer fall, if the article written for and sent never arrives, if the verbal answer when the parties are in each other's presence is in a foreign tongue, or by sudden noise or distraction is not heard, if the telegraphic circuit

¹ *Heiman v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 153; *Royal Ins. Co. v. Beatty*, 119 Pa. St. 6.

² *People's Ins. Co. v. Paddon*, 8 Brad. (Ill.) 447; *Mactier v. Frith*, 6 Wend. (N. Y.) 103; *Ins. Co. v. Lyman*, 15 Wall. 664.

³ *Mactier v. Frith*, 6 Wend. (N. Y.) 103.

⁴ *Potter v. Sanders*, 6 Hare, 1.

⁵ *Vassar v. Camp*, 14 Barb. (N. Y.) 341.

⁶ *Eliason v. Henshaw*, 4 Wheat. 225.

⁷ *Ibid.*

⁸ *Re Imperial Co. of Marseilles*, 7 Ch. Ap. 587; *Adams v. Lindsell*, 1 B. & Ald. 681; *Dunlop v. Higgins*, 1 H. L. C. 381; *Hallock v. Commer. Ins. Co.*, 2 Dutch. (N. J.) 268; 3 *Ib.*, 645; *Bentley v. Columbia Ins. Co.*, 17 N. Y. 421; *Blake v. Hamburg-Bremen Ins. Co.*, 67 Texas, 160; *Taylor v. Merch. F. Ins. Co.*, 9 How. 390.

⁹ *Duncan v. Topham*, 8 C. B. 225.

¹⁰ *Dunlop v. Higgins*, 1 H. L. C. 381.

¹¹ 2 Dutch. (N. J.) 268.

is broken, if the mail miscarries, if the word spoken or the letter sent is overtaken and countermanded by the electric current, is there no contract? In the progress of the negotiation at what precise point of time does the mind meet mind, does the contract spring into life? . . . The meeting of two minds, the *aggregation mentium* necessary to the constitution of every contract, must take place *eo instanti* with the doing of any overt act intended to signify to the other party the acceptance of the proposition, without regard to when that act comes to the knowledge of the other party. Everything else must be questions of proof or of the binding force of the contract by matters subsequent. The overt act may be as various as the form and nature of contracts. It may be by the fall of the hammer, by words spoken, by letters, by telegraph, by remitting the article sent for, by mutual signing, or by delivery of the paper, and the delivery may be by any act intended to signify that the instrument shall have a present vitality. Whatever the form, the act done is the irrevocable evidence of the *aggregation mentium*; at that instant the bargain is struck. The acceptor can no more overtake or countermand by telegraph his letter mailed than he can his words of acceptance after they have issued from his lips on their way to the hearer. If the two minds do not meet *eo instanti* with the act signifying acceptance, when can they in the nature of things ever approach each other more closely? The defendants say, when the act of acceptance comes to the knowledge of the other party. But this knowledge would be a fact without any force unless we suppose in the proposer a power still of electing not to accept the acceptance. But if we do this, it is apparent that the negotiation is yet precisely in the same stage of development it was in when the first proposition was waiting upon the first answer. The notion that there is no contract until the acceptance comes to the knowledge of the other party proceeds upon the ground, in the first place, that the proposal has been withdrawn or lost its force, which is against the intent of the parties and the necessities of the case; and in the second place, upon the ground that the answer is conditional when we suppose it to be absolute. We suppose the acceptor to say, not simply 'I agree,' but to say 'I agree if you do,' which requires an answer from the proposer; so that the minds do not meet till he answers. But in the meanwhile the acceptor may have changed his mind, and, for the

same reason as before, there is no bargain until the last answer comes to the knowledge of the other party; and so upon this theory it must go on *ad infinitum* without the possibility of the *aggregatio mentium* ever taking place. There is, in fact, no difference between the acceptance of a proposition by word of mouth and a letter stating an acceptance. In the one case it is articulate, carried by the air, in the other written signs carried by the mail or telegraph. The vital question is, was the intention manifested by any overt act, not by what kind of messenger it was sent? The bargain, if ever struck at all, must be *eo instanti* with such overt act." But in Massachusetts, where the acceptance was handed to the acceptor's agent, who happened to be also the postmaster, to forward, which he did not do till the next post-day, which was some days later, and, after the fire, it was held to be no contract, for being in the hands of the acceptor's agent it was revocable.¹

142. Where the proposer declared he would not be bound till receipt of the answer with a duplicate of the contract executed by the other party, it was held the deposit of the duplicate in the post-office completed the bargain.² It has been held that, unless requested by the proposer, an acceptance need not be made by a return mail, but one mailed the same day is sufficient.³ But if the proposer requires speedy acceptance, the requirement must be complied with.⁴ But to bind on posting, the letter must be prepaid; if not, it will only bind on acceptance.⁵

A proposer may retract, after he has made a proposal, before acceptance.⁶ But in *McCulloch v. Eagle Ins. Co.*,⁷ where A. mailed B. a letter inquiring on what terms he would insure his ships, and on January 1st B. mailed the rate, and on January 2d B. retracted, but A., before receiving the last letter, posted an acceptance of B.'s first letter, it was held no contract. The Court distinguished this case from the English leading cases of *Cooke v. Oxley*⁸ and *Payne*

¹ *Thayer v. Middlesex Mut. F. Ins. Co.*, 10 Pick. (Mass.) 326.

² *Blake v. Hamburg-Bremen F. Ins. Co.*, 67 Tex. 160.

³ *Vassar v. Camp*, 14 Barb. (N. Y.) 341.

⁴ *Payne v. Cave*, 3 T. R. 148; *Cooke v. Oxley*, 3 Ib. 653; *Routledge v. Grant*, 4 Bing. 653; *Sheldon v. Hekla F. Ins. Co.*, 65 Wis. 436.

⁵ *Dunlop v. Higgins*, 1 H. L. C. 381.
⁶ *Vassar v. Camp*, 14 Barb. (N. Y.) 341.

⁷ 1 Pick. (Mass.) 278.

⁸ 3 T. R. 653.

v. Cave.¹ But *Adams v. Lindsell*² was not cited. *McCulloch v. Eagle Ins. Co.*, however, is unsatisfactory, was disapproved in *Hallock v. Commer. Ins. Co.*,³ and is of doubtful authority outside of Massachusetts, unless the subject of marine insurance is considered by the Court liable to such contingencies that a different rule as to completion of the contract must be implied.⁴

143. When the contract is asserted from the silence of one of the parties, the rule is that, unless it was the duty of the silent party to have spoken, and his silence was calculated, whether willingly so or not, to have misled, no contract can be implied; but if he do not hear or understand he will not be bound.⁵ Where a contract is set up by reason of a prolonged silence, or delay to answer, it must be such as to mislead, and such that it was a duty to have avoided. Thus, where an application for a fire policy was made on August 7th to one of the directors of a company of a mutual character incorporated on July 24th, and on August 12th handed to the company, and a special meeting of the directors was had on the 19th, upon which occasion no business was done, and on the 30th instant a fire occurred, it was held there had been no unreasonable delay under the circumstances, or such as was calculated to mislead, especially as the company was mutual, which is governed frequently by other considerations than the mere character of the property.⁶ So in *Insurance Company v. Johnson*,⁷ which was followed with approval in *Heiman v. Phoenix L. Ins. Co.*,⁸ it was held a proposal for a policy will not be impliedly changed into a contract by a mere delay for six months on the part of the other side to answer, for the applicant would have had the right to reject for undue delay, if there had been an accep-

¹ 3 T. R. 148.

² 1 B. & A. 681.

³ 2 Dutch. (N. J.) 268; 3 Ib. 645.

⁴ See *Re Imperial Land Co. of Mar-seilles*, 7 Ch. Ap. 587.

⁵ *Royal Ins. Co. v. Beatty*, 119 Pa. St. 6. See *More v. N. Y. Bowery F. Ins. Co.*, 130 N. Y. 537.

⁶ *Harp v. Grangers' Mut. F. Ins. Co.*, 49 Md. 307.

⁷ 23 Pa. St. 72.

⁸ 17 Minn. 153. See also *Ins. Co. v. Johnson*, 23 Pa. St. 72; *Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill. 516; *Todd*

v. Piedmont & Arlington L. Ins. Co., 34 La. An. 63; *Conn. Mut. L. Ins. Co. v. Rudolph*, 45 Tex. 454; *Misselhorn v. Mut. Reserve Fund L. Ass'n*, 30 Fed. R. 545 (E. D. Mo.). In *Somerset Co. Mut. Ins. Co. v. May*, 2 W. N. C. (Pa.) 43, by a divided Court, a delay of seven months was held to raise the presumption of an accepted contract, as the agent had promised to notify the applicant when a rejection took place, which was not done. See also *Giles v. Jacques*, 1 Montreal L. R. S. C. 136.

tance at the end of the time, and the implication is just as strong in favor of a refusal by the delay as of an acceptance. But, where the insured is to be notified in a few days if the insurer would not take the risk and he pays the premium, and the insurer delays to notify him for eighteen days, such silence was held to bind.¹ And where no time was specified in a proposal made, it was held that an answer the next day was in time to bind.² Where the insured was to have sixty days after delivery of the policy and payment of the note, within which to notify the company of a refusal to be insured, this is conditional, and evidence is admissible to show that he took the policy to town where the insurer's agent resided, and tried to find him to notify him and return the policy, in order to rebut any presumption from inaction.³ Where the proposer suggests that the contract shall bind on the happening of some event, as the receipt of the certificate, the fact of delay would not be material.⁴

144. By the phrase, meeting of the minds of the two contracting parties, is meant a mutual agreement by the parties as to all the constituent elements of the bargain. In many contracts, as for example in sales, it may not often be material for one party to know the character or name of the other party with whom the contract is made, but in the contract of insurance, as the performance of the terms of the contract does not necessarily take place immediately and may be deferred for a lifetime, and sometimes may never be performed, owing to the non-occurrence of the contingency upon which the performance is dependent, it is usually of some moment for one party to know of the standing and solvency of the other, as upon his information on that point may depend his resolve to deal at all. And often the name of the insured or the payee must be ascertained at the formation of the contract.

A note signed by a party was held to bind him personally, though the words "school director" were added to his signature, the policy being for the school and the insurer relying on his obligation.⁵ Where a general partner of a limited partnership, under the Massachusetts Act, of which he was the only general partner and another

¹ *More v. N. Y. Bowery F. Ins. Co.*,
55 Hun (N. Y.), 540.

² *Chase v. Hamilton Mut. Ins. Co.*,
22 Barb. (N. Y.) 527.

³ *Watkins v. Bowers*, 119 Mass. 383.

⁴ *Kohen v. Mut. Reserve Fund L.*
Ins. Ass'n, 28 Fed. R. 705 (E. D. Mo.).

⁵ *Amer. Ins. Co. v. Stratton*, 12 Ins.
L. J. 409 (Iowa).

the special partner, took a policy without disclosing the fact that his name was used as the firm style, and the company supposed they were dealing with him as an individual, it was held not to avoid for want of mutuality; and evidence that the partnership had not complied with the act and was thus a general partnership, is inadmissible, since this only made them, so far as the public was concerned, but not *inter se*.¹ A mere defective spelling of the payee's name, which the context makes it clear is immaterial, as "Northwestern Life Insurance Company" instead of "Northwestern Mutual Life Insurance Company."²

145. The subject-matter or interest of the insured must also be ascertained.³ Thus, where a policy issued to one who had resided in one neighborhood and then removed to another, previously to the insurance on "his house," and the insurer intended the first house, but the insured the second, it was held no contract.⁴ So where a building was insured, described as "a machine-shop," but was "an organ factory," it was held the minds of the party had never met.⁵ So when the policy was on the bark "Empress, or by whatever name the vessel is or shall be named or called," and a bark named "The St. Mary," formerly called the "Empress," was lost, which the insured intended to insure, but the underwriter had intended to insure the "Empress," another distinct existing vessel, it was held there could be no recovery; for though a mistake in the name of a vessel in a policy of marine insurance is no obstacle to a recovery, if, in point of fact, both parties have in view the same vessel, and the underwriter, when the policy was issued, knows the true name, or intends to insure the

¹ *Clement v. Brit.-Amer. Assur. Co.*, 61 Me. 537; *Planters' Mut. Ins. Co. v. Engle*, 52 Md. 468; *Toppan v. Atkinson*, 2 Mass. 365; *Fabyan v. Union Mut. F. Ins. Co.*, 33 N. H. 203; *Mead v. West Chester F. Ins. Co.*, 3 Hun (N. Y.), 608; *Stewart v. Factor's Mut. Ins. Co.*, 14 Ins. L. J. 468 (Tenn.); *Strohn v. Hart. F. Ins. Co.*, 37 Wis. Ins. Co. v. Paddon, 8 Brad. (Ill.) 447; 625; *Liv. & Lond. & Globe Ins. Co. v. Wyld*, 1 Duv. (Can.) 604; *Queenville v. Mut. Ins. Co.*, 1 L. Can. L. Jur. 116.

² *Northw. Mut. L. Ins. Co. v. Germania F. Ins. Co.*, 40 Wis. 446.

³ *Langhorn v. Cologan*, 4 Taunt. 330; *Kimball v. Lion Ins. Co.*, 12 Ins. L. J. 923 (D. R. I.). See also *People's Ins. Co. v. Paddon*, 8 Brad. (Ill.) 447; *Tyler v. New Amsterdam F. Ins. Co.*, 4 Rob. (N. Y.) 151; *Trustees First Baptist Church v. Brooklyn F. Ins. Co.*, 28 N. Y. 153.

⁴ *Goddard v. Monitor Mut. F. Ins. Co.*, 108 Mass. 56.

⁵ See *Wass v. Me. Mut. Ins. Co.*, 108 Mass. 56.

particular vessel which has been lost, yet when there is a mistake as to the identity of the vessel sought to be insured, and the policy is issued upon another vessel than that for which application was made, no contract can exist, as the minds of the parties did not meet.¹ For further illustrations of this principle the reader is referred *infra* to Section 578 *et seq.*

It is very common in marine contracts to insure "lost or not lost;" as the subject-matter may be at a distance, and its existence incapable of ascertainment, and it has been held that a fire as well as a marine policy may be legally made, when the subject-matter of the interest insured is distant and its status unknown to either party to the contract.²

146. The amount insured must also be agreed upon.³ The fixing of a precise sum, however, is not essential if the method of arriving at it is arranged. Thus, in *Home Ins. Co. v. Adler*,⁴ where there was a verbal agreement to insure a stock of goods against fire, the amount of the risk being left to the insurer to insert in the policy, but which was not issued till after the loss, it was held a completed contract without the policy.⁵ The perils insured against must also be ascertained.⁶ Where the insurance was on goods in a store-house, as the charter only permitted fire and marine risks, it was held that the peril insured against may be assumed to be fire.⁷

147. The term or duration of the risk, that is, its commencement and termination, must be agreed on.⁸ It is not, however, necessary that at the formation of the contract its date of termination should be fixed, for an agreement that it shall terminate at the option of either is valid,⁹ and, therefore, the ascertainment of a certain or contingent duration of the policy is sufficient. But it has been held that

¹ *Hughes v. Mercant. Mut. Ins. Co.*, 55 N. Y. 265. *Co. v. Roessle*, 1 Gray (Mass.), 336; *Fitton v. F. Ins. Ass'n*, 20 Fed. R. 766

² *Security F. Ins. Co. v. Ky. M. & F. Ins. Co.*, 7 Bush (Ky.), 81. (D. Vt.).

⁶ See case in note 3.

³ See *People's Ins. Co. v. Paddon*, 8 Brad. (Ill.) 447; *Tyler v. New Amsterdam F. Ins. Co.*, 4 Rob. (N. Y.) 151; *Trustees First Baptist Church v. Brooklyn F. Ins. Co.*, 28 N. Y. 153.

⁷ *Baile v. St. Joseph F. & M. Ins. Co.*, 73 Mo. 371.

⁴ 77 Ala. 242.

⁸ *Home Ins. Co. v. Adler*, 71 Ala. 516; *Strohn v. Hart. F. Ins. Co.*, 37 Wis. 625. See also cases in note 3. See *post*, § 591.

⁹ See also *Supreme Lodge v. Grace*, 60 Tex. 569; *Real Estate Mut. F. Ins.*

Strohn v. Hart. F. Ins. Co., 37 Wis. 625.

previous dealings alone between parties are not enough to fix them, unless, indeed, there had been previous policies showing the subject-matter, rate, and other details, and the two policies are then admissible as evidence.¹ The commencement of the risk does not depend necessarily on the date of the policy's issue.² And the policy may even issue after a loss, and be antedated.³ Nor is a policy invalid which does not state the commencement of the risk, if it can be otherwise satisfactorily ascertained.⁴

148. Finally the price or rate must also be mutually fixed.⁵ It may, however, be left for future settlement on some designated plan, and the risk begin at once,⁶ or it may be impliedly agreed upon.⁷

149. When the agreement is conditioned on the happening of some event, the contract is not complete until the event occur.⁸ But the execution of a policy is not necessarily precedent to the formation of the contract.⁹ Nor is the delivery of a policy a precedent condition where one is intended to be furnished, unless specially made so.¹⁰ Where it is precedent, the mailing of a policy

¹ *Home Ins. Co. v. Adler*, 71 Ala. 516.

² *Hubbard v. Hartford F. Ins. Co.*, 33 Iowa, 325; *Keim v. Home Mut. F. & M. Ins. Co.*, 42 Mo. 38; *Baldwin v. Chouteau Ins. Co.*, 56 Mo. 151.

³ *Hallock v. Commer. Ins. Co.*, 2 Dutch (N. J.) 268; *Whitaker v. Farmer's Un. Ins. Co.*, 29 Barb. (N. Y.) 312.

⁴ *Folsom v. Merch. Mut. M. Ins. Co.*, 38 Me. 414; *Schroeder v. Trade Ins. Co.*, 109 Ill. 157.

⁵ See *Christie v. North Brit. Ins. Co.*, 3 C. S. C. (1st Ser.) 519; *Home Ins. Co. v. Adler*, 71 Ala. 516. See *People's Ins. Co. v. Paddon*, 8 Brad. (Ill.) 447; *Tyler v. New Amsterdam F. Ins. Co.*, 4 Rob. (N. Y.) 151; *Trustees First Baptist Church v. Brooklyn F. Ins. Co.*, 28 N. Y. 153; *Eames v. Home Ins. Co.*, 94 U. S. 621; *Brown v. Amer. Cent. Ins. Co.*, 70 Iowa, 390; *Kimball v. Lion Ins. Co.*, 12 Ins. L. J. 923 (D. R. J.).

⁶ *Cooke v. Aetna Ins. Co.* 7 Daly (N. Y.) 555.

⁷ *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216.

⁸ *Mactier v. Frith*, 6 Wend. (N. Y.) 103.

⁹ *Amer. Horse Ins. Co. v. Patterson*, 28 Ind. 17; *City of Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa, 276; *Woodruff v. Columbus Ins. Co.*, 5 La. An. 697; *Commer. Ins. Co. v. Hallock*, 3 Dutch. (N. J.) 645; *Collins v. Phoenix Ins. Co.*, 14 Hun (N. Y.), 534; *Krumm v. Jefferson F. Ins. Co.*, 40 Oh. St. 225; *Hughes v. Farmers' Ins. Co.*, 2 Clev. Rep. (Oh.) 125; *Christie v. North Brit. Ins. Co.*, 3 C. S. C. (1 Ser.) 519.

¹⁰ *Sheldon v. Conn. Mut. L. Ins. Co.*, 25 Conn. 207; *Amer. Horse Ins. Co. v. Patterson*, 28 Ind. 17; *South. L. Ins. Co. v. Kempton*, 56 Geo. 339; *Commer. Un. Assur. Co. v. State*, 113 Ind. 331; *Blanchard v. Waite*, 28 Me. 51; *Walker v. Metropolitan Ins. Co.*, 56 Me. 371; *Schwartz v. Germania L. Ins. Co.*, 18

by the insurer in response to an application is a legal delivery from the moment of mailing.¹ The mere execution of a policy, which, retained by the company, does not prove a contract, but to complete the bargain, the execution must be in response to a proposal.² But it is not necessary that the insured should physically take a policy from the insurer, but, unless some particular act is required to be done by the insured in order to signify his adoption of the contract, a policy duly executed and so intended is in law delivered, though the company retain possession of it.³ So where the company transmits a policy to their agent, to be by him transmitted to the insured, the contract is complete without manual delivery.⁴ When the insurer notified the insured of his possession of the policy, and that he hold it till called for, the premium to be paid in five days, and before the expiration of that time and before the receipt of policy or premium there was a loss, the contract was held complete on a tender after the loss within the five days.⁵ The agent of the insurer may also agree with the insured to hold the policy for safe keeping without any manual delivery taking place.⁶ So he may hold it

Minn. 448; *Misselhorn v. Mut. Reserve L. Ass'n*, 30 Mo. Ap. 589; *Brownfield v. Phoenix Ins. Co.*, 35 Mo. Ap. 54; *Baldwin v. Chouteau Ins. Co.*, 55 Mo. 151; *Hallock v. Commer. Ins. Co.*, 2 Dutch. (N. J.) 268; 3 *Ib.* 645; *Trustees First Baptist Church v. Brooklyn F. Ins. Co.*, 28 N. Y. 153; *Van Loan v. Farmers' Mut. F. Ins. Ass'n*, 90 N. Y. 280; 24 *Hun* (N. Y.), 132; *Palmer v. Commer. Travellers' Mut. Acc. Ass'n*, 53 *Hun* (N. Y.), 601; *Supreme Lodge v. Grace*, 60 *Tex.* 569; *Eames v. Home Ins. Co.*, 94 U. S. 621; *Fitton v. F. Ins. Ass'n*, 20 *Fed. Rep.* 766 (D. Vt.); *Kohen v. Mut. Reserve Fund L. Ass'n*, 28 *Fed. Rep.* 705 (E. D. Mo.); *Ewing v. Piedmont & Arlington Ins. Co.*, cited *Bliss on Insurance*, § 165 (N. D. Mo.); *Wemyss v. Medical Invalid L. Assur. Soc.*, 11 C. S. C. (2d Ser.) 151; *Paré v. Scottish Imp. Ins. Co.*, 2 *Stevens's Digest Quebec*, 410.

Dutch. (N. J.) 268; 3 *Ib.* 645; *Ky. Mut. Ins. Co. v. Jenks*, 5 *Porter* (Ky.), 96.

² *Fitton v. F. Ins. Ass'n*, 20 *Fed. R.* 766 (D. Vt.).

³ *Xenos v. Wickham*, 2 E. & G. Ap. 296; *Bragdon v. Appleton Mut. F. Ins. Co.*, 42 *Me.* 259.

⁴ *Lorscher v. Supreme Lodge*, 72 *Mich.* 316; *Cooper v. Pacific Mut. L. Ins. Co.*, 7 *Nev.* 116; *Hallock v. Ins. Co.*, 2 *Dutch.* (N. J.) 268; *Whitaker v. Farmers' Un. Ins. Co.*, 29 *Barb.* (N. Y.) 312; *Supreme Lodge v. Martin*, 12 *Ins. L. J.*, 628 (Pa.); *Yonge v. Equit. L. Assur. Soc.*, 30 *Fed. R.* 902 (E. D. Tenn.).

⁵ *New Eng. F. & M. Ins. Co. v. Robinson*, 25 *Ind.* 536.

⁶ *Dibble v. North Assur. Co.*, 70 *Mich.* 1; *Phoenix Ins. Co. v. Meier*, 28 *Neb.* 124; *Ins. Co. v. Colt*, 20 *Wall.* 560.

¹ *Hallock v. Commer. Ins. Co.*, 2

subject to the order of a third party.¹ And where there is a stipulation that the agent shall act for both parties, a delivery to such agent would complete the contract.² The agent's statement to the insured, that the policy is ready if he will call for it and pay the premium, is not necessarily a completion of the contract, unless the condition is complied with.³ Where a duly authorized agent of the insurer issues the policy and holds it for the insured, it binds.⁴ But a policy countersigned in the agent's hands as an escrow is not a good delivery.⁵

150. The agent, to bind, must be authorized to deliver the policy.⁶ Where, in a suit by the insurer for the premium, an applicant had told the agent he could not at once pay the premium, but signed the application agreeing to pay, and the agent was not authorized to waive, and the company sent to the agent a policy not to be good till prepayment, and later, the applicant again saying he was unable to pay it without authority from his principal, the agent sending it to the applicant, who took no notice of it, it was held no contract, since the insurer's own case showed there could be no delivery till payment, and the agent could not waive the stipulation.⁷ Although the insured is informed by the insurer that he intends to revoke his agent's appointment, a policy delivered before the revocation, or knowledge on the part of the agent of the insurer's intent to revoke, is binding.⁸ A communication addressed by the insurer to his agent as to backwardness in the agent's accounts, with a condition as to future policies, if not communicated, cannot affect the insured.⁹ An agent's declarations within the scope of his employment are binding against the company, and a declaration of the secretary, whose duties were to issue policy and receive premiums, that he thought the policy was issued and had no reason to doubt it, was admitted.¹⁰

¹ *Home Ins. Co. v. Curtis*, 32 Mich. 402. Co., 121 Mass. 338; *Flint v. Oh. Ins. Co.*, 8 Oh. 501; *May v. West. Assur. Co.*, 27 Fed. R. 260 (D. Minn.).

² *Ala. Gold L. Ins. Co. v. Herron*, 56 Miss. 643.

³ *Sun. L. Assur. Co. v. Page*, 15 Ont. Ap. 704.

⁴ *Wainer v. Milford Mut. F. Ins. Co.*, 153 Mass. 335.

⁵ *Lightbody v. N. Amer. Ins. Co.*, 23 Wend. (N. Y.) 18.

⁶ *Ins. Co. v. Colt*, 20 Wall. 560.

⁷ *Confederation L. Ass'n v. O'Donnell*, 22 Can. L. J. 417; 13 Duv. (Can.) 218; 2 R. & G. (N. Scot.) 231.

⁸ *Chase v. Hamilton Mut. Ins. Co.*, 22 Barb. (N. Y.) 527.

⁹ *Myers v. Liv. Lond. & Globe Ins. ruff*, 26 N. J. L. 541.

¹⁰ *Sussex Co. Mut. Ins. Co. v. Wood-*

151. A delivery, to be valid, must be intended as such, for handing over a policy for inspection, or to be held till some condition shall be performed, is not a delivery.¹ Where the policy is given to the insured, with an agreement that the contract is only to stand provided other policies can be surrendered, the surrender of the old policies must take place before the later policy becomes delivered in law.² And a vote in a company to issue a policy as a substitute to a former executed policy will not bind till the earlier policy is surrendered. Frequently, in beneficial associations, formal admission to membership is necessary to complete the contract, and then it is necessary to show this in order to sue on the contract.³

152. Where a policy is issued on merchandise generally, to be shipped, but it is stipulated that the shipments shall not be covered unless indorsed, indorsements on the policy to be the evidence of property, at the risk of the company, there can be no recovery unless such indorsements are made prior to the loss.⁴ An agreement to take so much insurance on mill property is not a completed contract if there was to be an apportionment between the personalty and realty, which was not made until the loss.⁵ Where the insured applied to an agent for a policy, making the necessary payment and executing the premium note, and on the application being transmitted to the home office, an alteration in the building was directed, etc., which was communicated to the insured by the secretary, who stated that when the company was duly certified this had

¹ *Rogers v. Charter Oak L. Ins. Co.*, Y. L. Ins. Co., 111 N. Y. 390; see *Lindauer v. Del. Mut. Safety Ins. Co.*, 13 Ark. 461.

² *Commw. v. Mass. Mut. F. Ins. Co.*, 112 Mass. 116; *Balt. & Oh. Employé's Relief Ass'n v. Post*, 122 Pa. St. 579; *New Era L. Ass'n v. Rossiter*, 132 Pa. St. 314.

³ *Schaefer v. Balto. M. Ins. Co.*, 33 Md. 109; *Edwards v. St. Louis Perpetual Ins. Co.*, 7 Mo., 382. See *R. Carver Mfr's Ins. Co.*, 6 Gray (Mass.), 214; *Wells v. Pacific Ins. Co.*, 44 Cal. 397.

⁴ *Faunce v. State Mut. L. Ins. Co.*, 101 Mass. 279; *Nat. Bk. & Ins. Co. v. Knaup*, 55 Mo. 154; *Harnickell v. N.*

Y. L. Ins. Co., 111 N. Y. 390; see *Lindauer v. Del. Mut. Safety Ins. Co.*, 13 Ark. 461.

⁵ *Kimball v. Lion F. Ins. Co.*, 17 Fed. R. 625 (D. R. I.).

been complied with a policy would be sent, it was held, that compliance with this condition and notification thereof to the agent, requesting him to call and examine, though he neglected to do so, bound the insurer from the date of such notification.¹ Where the insurer, who had become liable for a loss on a boat, issued a second policy, in which the insured stipulated that the damage sustained under the first policy should be repaired, and while the repairs were going on the boat sank, it was held the second policy attached, as there was no agreement that the repairs were to be completed prior to the attaching of the second policy.²

153. Prepayment of the premium, though not necessarily, is very frequently made a condition, and the contract is then incomplete until the premium is paid. For example, in *Foudrinier v. Hartford F. Ins. Co.*,³ a risk was accepted in March conditionally on the making of certain alterations, which were made, and in the following January a policy issued antedated as of the previous May, providing it should not attach till the premium had been paid. It was paid in January and, after May, but before January, the risk had been increased, and it was held that the contract was not complete till January, and that, therefore, the increase was before completion.

154. The policy subsequently delivered must correspond with the prior application or proposal.⁴ And where an application was given to the insurer's agent to be sent to the company, to bind if the company accepts, and it was returned but altered as to terms, it does not bind the parties until accepted by the applicant.⁵ The signing of the application and accepting the policy is an implied agreement to the conditions therein.⁶ Though to an illiterate per-

¹ *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. St. 339. See also *Willeys v. Sun Mut. Ins. Co.*, 45 N. Y. 45.

² *Hyde v. Miss. M. & F. Ins. Co.*, 10 La. 543.

³ 15 U. C. C. P. 403. See *post*, § 198 *et seq.*, 894 *et seq.*

⁴ *Amer. Ins. Co. v. Neiberger*, 74 Mo. 167; *Lippincott v. Ins. Co.*, 3 La. 546; *Norris v. Ins. Co. of N. A.*, 3 Yeates (Pa.) 84; *Ins. Co. v. Young*, 23 Wall. 85; *Ocean F. Ins. Co. v. Carrington*, 3 Conn. 357; *Canadienne Com. d'Assur. Perrault*, 5 L. R. Sup. Ct. (Mont.) 62.

⁵ *Yore v. Bankers', Etc., L. Ass'n.*, 88 Cal. 609; *Hunter v. Scott*, 108 N. C. 213; *Ins. Co. v. Young*, 23 Wall. 85; *Roman Catholic Bishop of Chatham v. West. Assur. Co.*, 22 N. B. 242.

⁶ *Brown v. Mass. Mut. L. Ins. Co.*, 59 N. H. 298; *Richardson v. Me. Ins. Co.*, 46 Me. 394; *Van Buren v. St. Joseph Co. Vil. F. Ins. Co.*, 28 Mich. 398; *Balto. F. Ins. Co. v. Loney*, 20 Md. 20.

son it would be better perhaps that the agent should read the application.¹ The declaration of an agent to prove a contract existed, must be made while acting for his principal.²

Questions of fact as to whether a delivery has been made,³ or as to the formation of a contract, are for the jury.⁴

¹ *Pierce v. Empire Ins. Co.*, 62 Barb. Co., 13 Allen (Mass.), 320; *Loring v. Procter*, 18 Me. 18. (N. Y.) 636.

² *Long v. North Brit. and Mercant. Ins. Co.*, 137 Pa. St. 335. ⁴ *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.), 448; *Long v. North Brit. and Mercant. Ins. Co.*, 137 Pa. St. 335.

³ *Newark F. Ins. Co. v. Sammons*, 110 Ill. 166; *Baxter v. Massasoit Ins.*

CHAPTER IV.

THE THING INSURED, OR INSURABLE INTEREST.

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DIVISION I.—IN RESPECT OF PROPERTY.

155. The thing insured is the interest the insured possesses in the property exposed to the peril insured against, and this is termed his insurable interest.¹ And in all such contracts, unless possibly marine insurances, it is necessary that the insured should possess an interest during the contract and at the loss, and a policy without any interest is a mere wager and void at the common law.²

In England the Act of 14 Geo. III., c. 48, entitled "an Act for regulating insurances upon lives, and for prohibiting all such insurances except in cases where the persons insuring shall have an interest in the life or death of the person insured," provided that "no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons,

¹ See ante, § 155.
² See *Sadler's Co. v. Badock*, 2 Atk. N. Y. 210; *Peabody v. Wash. Co. Mut. Ins. Co.* 20 Barb. (N. Y.) 339; *Freeman v. Fulton F. Ins. Co.*, 38 Ib. 247; *Amory v. Gilman*, 2 Mass. 1; *Prichett v. Ins. Co. of N. A.*, 3 Yeates (Pa.), 458; *Pa. Cent. Ins. Co. v. Gayman*, 7 Leg. Gaz. 234 (Pa.); *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Porter v. Ætna Ins. Co.*, 2 Flip. 100 (W. D. Mich.); *Spare v. Home Mut. Ins. Co.*, 8 Saw. 618 (D. Or.).

³ *Fenn. v. New Orleans Mut. Ins. Co.*, 53 Ga. 578; *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Ill. Mut. F. Ins. Co. v. Marseilles Manfg. Co.*, 1 Gil. (Ill.) 36; *Bersch v. Sinnissippi Ins. Co.*, 28 Ind. 64; *Home Ins. Co. v. Duke*, 75 Ind. 535; *Ayres v. Hart. F. Ins. Co.*, 17 Iowa, 176; *Alliance M. Ins. Co. v. La. St. Ins. Co.*, 8 La. 1; *Clark v. Dwelling-House Ins. Co.*, 81 Me. 373; *French v. Rogers*, 16 N. H. 177; *Mur-*

or any other event or events whatsoever." In consideration of 40 guineas for 100 pounds, and so on according to that rate for every greater or less sum, several persons agreed severally to pay the sums set opposite their names in case Brazilian mining shares should, on or before a certain day, "be done at or above" a certain sum, and it was held the contract was a policy within the Act and void, Tindal, C. J., saying: "It is a well-established rule of construction that the title of an Act will not extend its effect beyond the meaning of the operative words, but neither will it confine its effect, and the operative words here are larger than the title."¹

156. It is difficult to define accurately in what an insurable interest consists. The insured need not be interested in the whole of the property destroyed;² nor is it necessary that he have a legal interest, but an equitable interest is sufficient.³ The title of the insured may be defective, or even bad, provided he has possession and use.⁴ Nor need the title be even a strictly valid equitable estate or interest, but it is sufficient that the insured have a direct pecuniary interest in its preservation.⁵ But it must not be understood that a bare possibility that a right to property might thereafter arise would be sufficient to give an insurable interest.⁶ In *Lucena v. Craufurd*,⁷ Lord Eldon observed: "In order to distin-

¹ *Patterson v. Powell*, 9 Bing. 320.

² *Ketchum v. Protec. Ins. Co.*, 1 Allen (N. B.), 136. Co., 77 Wis. 4; *Buck v. Chesapeake*

³ *Fenn v. New Orleans Mut. Ins. Co.*, 53 Ga. 578; *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Home Ins. Co. v. Bethel*, 42 Ill. Ap. 475; *Baldwin v. State Ins. Co.* 60 Iowa 497; *Clark v. Dwelling-House Ins. Co.*, 81 Me. 373; *Locke v. North Amer. Ins. Co.*, 13 Mass. 61; *Goodall v. New Eng. Mut. F. Ins. Co.*, 25 N. H. 169; *Rohrbach v. Germania F. Ins. Co.*, 62 N. Y. 47; *Cross v. Nat. F. Ins. Co.*, 132 N. Y. 133; *Coursin v. Pa. Ins. Co.* 46 Pa. St. 323; *Tuckerman v. Home Ins. Co.*, 9 R. I. 414; *Small v. Providence Wash. Ins. Co.*, 23 S. C. 190; *Swift v. Vt. Mut. F. Ins. Co.*, 18 Vt. 305; *Horsch v. Dwelling-House Ins.*

Ins. Co. 1 Peters, 151; *Porter v. Aetna Ins. Co.*, 2 Flip. 100 (W. D. Mich.); *Clark v. Scot. Imperial Ins. Co.*, 4 Duv. (Can.) 192; *Whyte v. Home Ins. Co.*, 14 L. Can. J. 301.

⁴ *Travis v. Continen. Ins. Co.*, 32 Mo. Ap. 1981.

⁵ *Merrett v. Farmers' Ins. Co.*, 42 Iowa, 11; *Herkimer v. Rice*, 27 N. Y. 163, 173; *Riggs v. Commer. Mut. Ins. Co.*, 125 N. Y. 7; *Farmers' and Mechan. Mut. F. Ins. Co. v. Meckes*, 10 W. N. C. (Pa.) 306.

⁶ *McCarty v. Commer. Ins. Co.*, 17 La. 361; *Merrett v. Farmers' Ins. Co.*, 42 Iowa, 11.

⁷ *Lucena v. Craufurd*, 2 B. & P. N. R. 269.

guish that intermediate thing between a strict right, or a right derived under a contract, and a mere expectation or hope, which has been termed an insurable interest, it has been said in many cases to be that which amounts to a moral certainty. I have in vain endeavored, however, to find a fit definition of that which is between a certainty and an expectation; nor am I able to point out what is an interest, unless it be a right in the property or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party." But a thing not yet in existence, as grain to be grown, even where the land on which it was planted was subsequently acquired by the insured, may be the subject of insurance.¹ Blackburn, J., remarked, in *Wilson v. Jones*,² that he knew no better definition of an interest in an event than that indicated by Lawrence, J., in *Barclay v. Cousins*,³ and more fully stated by him in *Lucena v. Crauford*,⁴ which was that "A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it, and whom it importeth that its condition as to safety or other quality should continue. Interest does not necessarily imply a right to the whole or part of the thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in, the subject of the insurance, which relation or concern, by the happening of the perils insured against, may be so affected as to produce a damage, detriment, or prejudice to the person insuring. And where a man is so circumstanced with respect to matters exposed to certain risks and dangers as to have a moral certainty of advantage or benefit but for those risks and dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of the thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction. The property of the thing and the interest derivable from it may be very different; of the first, the price is generally the measure; but by interest in a thing every benefit and advantage arising out of or depending on such thing may be considered

¹ *Sawyer v. Dodge Co. Mut. Ins. Co.*,
37 Wis. 503.

² 2 East, 544.

³ 2 B. & P. N. R. 269.

⁴ L. R. 2 Exch. 150.

as being comprehended.”¹ In *Merrett v. Farmers’ Ins. Co.*,² Beck, J., put it, “an interest to be insurable does not depend upon title or ownership of the property; it may be a special or limited interest, disconnected from title, lien, or possession. If the holder of an interest in property will suffer loss by its destruction, he may indemnify himself therefrom by a contract of insurance. The interest must be of such a character that the destruction of the property will have a direct effect upon it, not a remote or consequential effect. If by the loss the holder of the interest is deprived of the possession, enjoyment, or profits of the property, or of a security or lien resting thereon, or other certain benefits growing out of or depending upon it, he holds an insurable interest.”³ And in *Castellain v. Preston*,⁴ Bowen, L. J., said: “I do not know any reason why there should be a different definition of what is an insurable interest in fire policies from that which is well known as the established definition in marine policies, allowance being made for the differences of the subject-matter.”

157. It was formerly supposed and the rule was so laid down that an interest in the property must exist at the time of effecting the policy as well as at the loss.⁵ But, as was observed by Swayne, J., in *Hooper v. Robinson*,⁶ quoting the remarks of Mr. Arnould with approval,⁷ “it is now clearly established that an insurable interest, subsisting during the risk and at the time of loss, is sufficient, and that the assured need not also allege or prove that he was interested at the time of effecting the policy, as a deed voidable under certain circumstances may be made valid; a devise to a charitable use may be made to a grantee not in esse, and vest when the grantee shall exist, policy lost or not lost;” and adding, “this is consistent with reason and justice, and is supported by analogies of the law in other cases.” After these general remarks we shall consider in detail what interests have been considered insurable.

¹ See *Lucena v. Craufurd*, 2 B. & P. N. R. 269, 302; *Barclay v. Cousins*, 2 East, 544.

² 42 Iowa, 11.

³ *Carter v. Humboldt F. Ins. Co.*, 12 Iowa, 287; *Hooper v. Robinson*, 8 Ins. L. J. 497 (U. S.); *Nat. Filtering Oil Co. v. Cit. Ins. Co.*, 106 N. Y. 535.

⁴ 11 Q. B. D. 397.

⁵ See *Folsom v. Merch. Mut. Ins. Co.*, 38 Me. 414; *Howard v. Albany Ins. Co.*, 3 Den. (N. Y.) 301; *Chrisman v. State Ins. Co.*, 16 Oreg. 283. See *ante*, §§ 4, 155.

⁶ 8 Ins. L. J. 497 (D. Md.), p. 501.

⁷ 1 Arnould on Ins. (6th Ed.), 59.

158. One who has agreed to sell a chattel, but who has neither sold nor delivered, has an interest.¹ So the seller has interest where, after receipt of part of the price, he retains the property as security for the remainder.² Or where there is a contract to sell to be paid for on delivery, and the delivery has not taken place, though the goods had been invoiced and inspected;³ or, where a manufacturer, he has interest till the title in the thing made passes to the buyer.⁴ Or, where he is to place an article in the buyer's premises and keep it in repair for a defined period, he has interest on a loss before completion of the period.⁵

159. So a vendor of land before the completion of the sale has interest. Thus a vendor before conveyance in whom the title was to remain till payment of the price has interest.⁶ Or a vendor who has agreed to sell, but has not conveyed or been paid the price in full.⁷ Or a vendor, after a sale, but where the vendee had agreed to secure payment of the purchase by a bond and mortgage, but which was unperformed.⁸ Or where the vendor has at the time of the contract of sale agreed orally to assign his policy, which he had not done, nor had the price been paid.⁹ But it has been held that a vendor who has been paid in full, but has not yet conveyed, has no interest, as he only retains a bare legal estate without any interest, lien, or liability.¹⁰ It was decided in Pennsylvania that an insured vendor, who had taken a judgment for the purchase-money from the vendee, had no interest in the property after the sale to sustain a recovery from the insurer; because the judgment was not a specific but only a general lien, and he had no interest in the property, but only in his lien, and if there were personal property

¹ *Bell v. Fireman's Ins. Co.*, 3 Rob. (N. Y.) 87; *Trumbull v. Portage Co. Mut. Ins. Co.*, 12 Oh. 305; *Wood v. Ins. Co.*, 2 Cr. & P. 442. *Northw. Ins. Co.*, 46 N. Y. 421; *People's Ins. Co. v. Straehle*, 2 Cin. S. C. R. (Oh.) 186.

² *Norcross v. Ins. Cos.*, 17 Pa. St. 429.

³ *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242.

⁴ See *Grant v. Parkinson Ins. Co.*, 3 B. & P. 85, note.

⁵ See *Appleby v. Myers*, L. R. 2 C. P. 651; *Claperede v. Commercial Union*, cited in *Porter on Insurance*, 63.

⁶ *Tallman v. Atlan. Ins. Co.*, 3 Keys

⁷ *Hill v. Cumberland Val. Mut. Protec. Co.*, 59 Pa. St. 474.

⁸ *F. & M. Ins. Co. v. Morrison*, 11 Leigh (Va.), 354.

⁹ *Ib.*

¹⁰ *New South Wales Bk. v. North Brit. & Mercan., Etc., Co.*, 2 New South Wales L. 239.

the debt should first be satisfied out of it.¹ And where A., who is insured, sells to B. absolutely, and at the same time agrees that B. shall try to resell and that a certain share of the proceeds is to go to A. if a certain limit is reached, the agreement was held to create a personal obligation on the part of B. only, and that A. had no interest.² It was held in the Federal Court in Rhode Island that a parol contract by a feme covert to convey realty without her husband joining in the execution is void, and therefore that she had interest up to the full amount in the realty after the void agreement.³ And in Canada, a vendor who had conveyed in fraud of creditors, was held to have interest.⁴ An assignee in bankruptcy who, under an order of Court, had made a sale which was confirmed, but which order was rescinded and appeal taken, and who had insured after the entry of the order, but before the Court had in the first instance confirmed the sale, was held to have interest.⁵

160. A buyer has an interest in the chattels purchased, but not actually identified or severed from a general depot,⁶ like chattels contained in a warehouse, as barrels of oil,⁷ or bushels of wheat.⁸ One in possession of goods under a contract of sale has interest equal to the amount paid by him.⁹ The holder of a chattel with a conditional right of possession and user under an agreement for its purchase by paying instalments to the owner, who retains the title until the full price is paid, has interest.¹⁰ So one has interest who bought certain mules for a company, which were to remain his property and to be retained by him in possession till his advances, part of which were made for them, were paid.¹¹

A great variety of cases has arisen as to the precise moment when title passes in executory sales of goods, which is often a

¹ *Grevemeyer v. South. Mut. F. Ins. Co.*, 62 Pa. St. 340.

² *Balow v. Teutonia Farmers' Mut. F. Ins. Co.*, 77 Mich. 540.

³ *Perry v. Mechan. Mut. Ins. Co.*, 11 Fed. R. 478 (D. R. I.).

⁴ *Pettigrew v. Grand River F. Mut. Assur.*, 28 U. C. C. Q. 70.

⁵ *Gill v. Can. F. & M. Ins. Co.*, 1 Ont. R. 341.

⁶ *Cumberland Bone Co. v. Andes Ins. Co.*, 64 Me. 466.

⁷ *Mathewson v. Royal Ins. Co.*, 16 L. Can. J. 45.

⁸ *Box v. Provincial Ins. Co.*, 18 Grant Ch. (Can.) 280.

⁹ *Michael v. St. Louis Mut. F. Ins. Co.*, 17 Mo. Ap. 23.

¹⁰ *Reed v. Williamsburg City F. Ins. Co.*, 74 Me. 537; *Kenny v. Clarkson*, 1 John. (N. Y.) 385; *Lasher v. Northw. Nat. Ins. Co.*, 55 How. Pr. (N. Y.) 324.

¹¹ *Holbrook v. St. Paul F. & M. Ins. Co.*, 25 Minn. 229.

factor as to the question of interest. For the most part these belong to the subject of marine insurance, but a number of them are inserted in the note.¹

The purchaser under an oral contract of sale has been held to have an insurable interest in the thing sold, notwithstanding the Statute of Frauds.²

161. A vendee of realty has an insurable interest, and it has been broadly put, that where the vendee has any direct pecuniary interest which will be affected by the loss, he has sufficient interest.³ Thus a vendee of realty under contract of sale in possession, after a partial payment of the price, has interest.⁴ Or a vendee not in possession, but who had paid part of the price.⁵ Or a vendee under a valid contract to buy, where no price had been paid or possession taken.⁶ Where A. executed to B. a bond conditioned to make a title to realty on being paid a sum at a certain date, and B. erected thereon a mill, it was held B. had insurable interest therein.⁷ Where the owner conveyed to a fictitious person, and then reconveyed in the latter's name to the insured, it was held the insured took through the last conveyance and had an interest, though the first conveyance to the fictitious person might be void, as the vendor could convey as he liked to a purchaser.⁸ In *Farmers' & Mechan. Mut. Ins. Co. v. Meches*,⁹ the insured contracted to purchase the premises and paid one-fourth of the price, but subsequently assigned his interest under the contract to his vendor, retaining his possession under a parol agreement that

¹ *Fragano v. Long*, 4 B. & C. 219; *F. Ins. Co. v. Tyler*, 16 Wend. (N.Y.) 385; *McGivney v. Phoenix F. Ins. Co.*, 8 C. P. 596; *Inglis v. Stock*, 10 Ap. Cas. 1 lb. 85; *Lorillard F. Ins. Co. v. McCulloch*, 21 Oh. St. 176; *Ramsey v. Paul F. & M. Ins. Co.*, 21 Minn. 85; *Phoenix Ins. Co.*, 2 Fed. R. 429 (N. D. N.Y.); *Milligan v. Equit. Ins. Co.*, 16 U. C. Q. B. 314; *Humphrey v. Lond. & Lancash. Ins. Co.*, 2 Nov. Scot. Dec. St. 391.

² *Amsinck v. Amer. Ins. Co.*, 129 Mass. 185.

³ *Tyler v. Ætna Ins. Co.*, 12 Wend. (N.Y.) 507; *Mut. F. Ins. Co. v. Wagner*, 15 Ins. L. J. 704 (Pa.); *Columbian Ins. Co. v. Lawrence*, 2 Peters, 25.

⁴ *Grange Mill Co. v. West. Assur. Co.*, 118 Ill. 396; *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568; *Ætna*

⁵ *Acer v. Merch. Ins. Co.*, 57 Barb. (N.Y.) 68.

⁶ *Brewer v. Herbert*, 30 Md. 301; *Ætna Ins. Co. v. Miers*, 5 Sneed (Tenn.), 139.

⁷ *Ayres v. Hart. F. Ins. Co.*, 17 Iowa, 176.

⁸ *David v. Williamsburgh City F. Ins. Co.*, 10 Ins. L. J. 150 (N.Y.).

⁹ 10 W. N. C. (Pa.) 306.

the vendor should reconvey to him upon payment of a stipulated sum, and it was held the vendee had an insurable interest. Where A. deeded a house to B., the price being partly in cash and partly in notes payable in instalments, retaining the vendor's lien for the price, and B. insured, and subsequently to the loss, but antedating it, an executory agreement was made rescinding the contract of sale and the vendor's lien which was to be consummated by an exchange of deeds and notes at a date posterior to the loss, it was held B. had an interest; for though the sale was rescinded, the consummation of the agreement of rescission was not to take place till after the date of the loss.¹ It has been held in Rhode Island that an alienee of a portion of land belonging to a married woman, under a parol contract without joinder of her husband in execution, who had taken a policy with her, had no interest, as the conveyance to him was void.² But a vendee in possession under a parol agreement with part of the purchase-money paid, has in Rhode Island an insurable interest.³ The vendee of the property and assignee of a policy issued to the vendor may sue on it, though the sale may appear to have been made to defeat creditors, and the title is only colorable; for it is for creditors, if for any one, to set aside.⁴

162. A lessor has interest.⁵ So a lessor, owning the greater portion of the machinery in a factory, and who had seized on other machinery in the building under a landlord's warrant, has an insurable interest in the whole.⁶ A lessor of a lot has interest in the buildings erected on the leased ground which are to be surrendered at the end of the term.⁷ And a lessor on ground-rent, who has entered till the arrears should be paid.⁸

163. A tenant has an insurable interest during the lease.⁹ And so has a tenant from year to year, up to the value of the tenement occupied during the unexpired term.¹⁰ So a tenant of a homestead

¹ *McCutcheon v. Ingraham*, 32 W. Va. 378.

⁷ *Mayor of New York v. Exchange F. Ins. Co.*, 9 Bos. (N. Y.) 424; 10 Ib.

² *Perry v. Mechan. Mut. Ins. Co.*, 11 Fed. R. 478 (D. R. J.).

⁸ *Miltenberger v. Beacom*, 9 Pa. St. 198.

³ *Tuckerman v. Home Ins. Co.*, 9 R. I. 414.

⁹ *Ely v. Ely*, 80 Ill. 532. See *Ga. Home Ins. Co. v. Jones*, 49 Miss. 60;

⁴ *Crafts v. Un. Mut. F. Ins. Co.*, 36 N. H. 44.

Phila. Tool Co. v. Brit.-Amer. Assur. Co., 132 Pa. St. 236.

⁵ *Ely v. Ely*, 80 Ill. 532.

⁶ *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331.

¹⁰ *Niblo v. North Amer. F. Ins. Co.*, 1 Sandf. (N. Y.) 551.

leased from the head of the family for a term of years, who had erected valuable improvements thereon, can recover the value thereof.¹ Or a tenant who builds on leased land a gin-house under an agreement that at the end of the term the lessor shall buy at a price to be then agreed upon.² Or a tenant of property, conveyed by him to the lessor to secure a debt for a term of years, with the privilege of purchasing during the term.³ An agreement by the tenant to insure for the landlord's benefit gives him an interest to that extent;⁴ the value of the property he is bound to replace.⁵

A subtenant has an insurable interest.⁶ But where lessees of a farm are under an agreement to fodder the stock with the hay grown on the farm, but not to sell it, a buyer of the hay would have no interest therein.⁷ In Canada, a tenant of glebe lands, under a lease with covenants for further renewals, continuing in possession after death of the lessor and induction of his successor against the latter's will, has no interest, the successor not being bound by the covenant.⁸ An insurance of realty held under a verbal⁹ lease for life in consideration of the payment of taxes and insurance may be perfectly valid, though such a lease may be void, as that is a matter between the lessor and lessee, and does not affect the insurer.¹⁰

164. A mortgagor of land has an insurable interest up to the value of the buildings on the mortgaged premises.¹¹ So has a grantor of land conveyed to secure a debt, with an agreement or a clause of defeasance.¹² The mortgagor's interest continues so long as he holds the equity of redemption, although the mortgagee has taken

¹ *Creech v. Richards*, 76 Ga. 36.

⁹ *Berry v. Amer. Cent. Ins. Co.*, 132

² *Allen v. Sun Mut. Ins. Co.*, 36 La. An. 767.

N. Y. 49.

³ *Creighton v. Homestead F. Ins. Co.*, 17 Hun (N. Y.), 78.

¹⁰ *Honoré v. Lamar F. Ins. Co.*, 51

⁴ *Lawrence v. St. Marks F. Ins. Co.*, 43 Barb. (N. Y.) 479.

Ill. 409; *Lycorn. F. Ins. Co. v. Jackson*, 83 Ill. 302; *Ill. F. Ins. Co. v. Stanton*, 57 Ill. 354; *McDonald v. Black*, 20 Oh. 185.

⁶ *Imperial F. Ins. Co. v. Murray*, 73 Pa. St. 13.

¹¹ *Ins. Co. v. Stinson*, 103 U. S. 25; *French v. Rogers*, 16 N. H. 177; *Foster v. Van Reed*, 70 N. Y. 19.

⁵ *Ga. Home Ins. Co. v. Jones*, 49 Miss. 80.

¹² *Walsh v. F. Ass'n*, 127 Mass. 383; *Kelly v. Liv. & Lond. & Globe Ins. Co.*, Stev. Dig. (N. B.) 739.

⁷ *Heald v. Builders' Mut. F. Ins. Co.*, 111 Mass. 38.

⁸ *Shaw v. Phoenix Ins. Co.*, 20 U. C. C. P. 170.

possession.¹ And it has been held that this interest continues after his own right to redeem has lapsed, so long as a right remains in judgment creditors; for while this right continues, it is possible for him to procure a loan, and confess judgment as security therefor, and thereby create a right to redeem; and this is an interest affected by the loss of, or damage to, the mortgaged buildings by fire.² It has been decided, under the New York practice, that a sale of the mortgaged premises by a master in chancery under a decree of foreclosure and part payment of the purchase-money extinguished the mortgagor's interest, though the decree had not been enrolled and no deed given; as the sale passed the present interest and the deed would relate back to the sale.³ Where a sale under foreclosure proceedings has been vacated by the Court, on appeal, the interest of the mortgagor becomes the same as before the sale.⁴ In *Waring v. Loder*,⁵ a mortgagee with a bond was authorized to insure, the premium to be part of the mortgage debt; the mortgagor sold the premises, and later the assignee of the mortgage foreclosed, and the sale bringing less than the debt, judgment was entered for the deficiency; before its entry a fire occurred, and it was held that after the sale of the premises the mortgagor was liable on his bond for the deficiency, and therefore had an interest, and that the mortgagee insuring for the benefit of the mortgagor could recover. In *Pelligrew v. Grand River Farmers' Mut. Assur. Co.*,⁶ A. purchased realty from his father, raising the money by a mortgage, and in consequence of a threatened suit "about a girl" he reconveyed the property to his father subject to the mortgage for a small sum, but continued to reside there, and insured, and it was held the son had an interest; and as the threatened suit had not been brought, and though the father might be a bare trustee, yet as he was willing to reconvey to his son, the insurance company could not set up the defence of a fraudulent immoral conveyance as between A. and his father, or presume that he would set up that defence and refuse to reconvey. A mortgagor of a chattel has, also, an insurable interest,

¹ *Essex Sav. Bk. v. Meriden F. Ins. Co.*, 57 Conn. 335; *Stephens v. Ill. Mut. F. Ins. Co.*, 43 Ill. 327; *Cone v. Niag. F. Ins. Co.*, 60 N. Y. 619; *Ætna F. Ins. Co. v. Miers*, 5 Sneed (Tenn.), 139.

² *Cone v. Niagara F. Ins. Co.*, 60 N. Y. 619.

³ *McLaren v. Hartford F. Ins. Co.*, 5 N. Y. 151.

⁴ *Richland Co. Mut. Ins. Co. v. Sampson*, 12 Ins. L. J. 283 (Oh.).

⁵ 53 N. Y. 581.

⁶ 28 U. C. C. P. 70.

though mortgaged up to its value in full,¹ so long as he holds the equity of redemption.² And a pledgor of personalty has interest.³

165. The mortgagee of realty has an insurable interest.⁴ A mortgagee not in possession has interest,⁵ though the note the mortgage secures is pledged.⁶ So where a mortgagee indorses the note which the mortgage secures and assigns the mortgage to secure it, the assignee has interest.⁷ The interest of the mortgagee is up to his debt.⁸ And when the mortgagee forecloses his interest is at an end.⁹ Where the mortgage is to secure future advances, after they are made this liability enables the insured mortgagee to recover.¹⁰ Where a mortgagee insures a particular mortgage the policy will not include others he may have on the premises.¹¹ In *Bradford v. Greenwich Ins. Co.*,¹² it was mooted whether, after payment of the mortgage debt, the insurance can be collected for the mortgagor, when, though in the name of the mortgagee, the mortgagor pays the premium. In *Bank of New South Wales v. Royal Ins. Co.*,¹³ however, the Court doubted whether a company could decline to settle a loss with mortgagees on the ground that the mortgage money had been paid. In Massachusetts, however, it was held a mortgagee's right to recover is not affected by the replacement of the loss by the owner of the equity of redemption.¹⁴ But in the Federal Court in the Northern District of Illinois a policy by the mortgagor payable to the mortgagee was held only to pro-

¹ *Higginson v. Dall*, 13 Mass. 96; *Williams v. Cincinnati Ins. Co.*,
Appleton Ins. Co. v. Brit.-Amer. Assur. Co., 46 Wis. 23. *Wr. (Oh.)* 542.

² *Allen v. Franklin F. Ins. Co.*, 9
How. Pr. (N. Y.) 501.

³ *Nussbaum v. North. Ins. Co.*, 37
Fed. R. 524 (S. D. Ga.).

⁴ *Honore v. Lamar F. Ins. Co.*, 51
Ill. 409; *Ill. F. Ins. Co. v. Stanton*, 57
Ill. 354; *Kellar v. Merch. Ins. Co.*, 7
La. An. 29; *Parks v. Hart. Ins. Co.*,
100 Mo. 373; *Sussex Co. Mut. Ins. Co.*
v. Woodruff, 2 Dutch. (N. J.) 541; *Mc-*
Donald v. Black, 20 Oh. 185; *Greve-*
meyer v. Southern Mut. F. Ins. Co., 62
Pa. St. 340; *Appleton Ins. Co. v. Brit.*
Amer. Assur. Co., 46 Wis. 23.

⁵ *Ib.*

⁷ *Williams v. Roger Williams Ins.*
Co., 107 Mass. 377.

⁸ *Hadley v. N. H. F. Ins. Co.*, 55 N.
H. 110; *Thornton v. Enterprise Ins.*
Co., 71 Pa. St. 234.

⁹ *Gaskin v. Phoenix Ins. Co.*, 6 Allen
(N. B.), 429.

¹⁰ *Rex v. Ins. Co.*, 2 Phila. 357.

¹¹ *Smith v. Columbia Ins. Co.*, 17 Pa.
St. 253.

¹² 8 Abb. Pr. (N. Y.) 261.

¹³ 9 Ins. L. J. 930 (British Empire.)

¹⁴ *Foster v. Equit. Mut. F. Ins. Co.*, 2
Gray (Mass.), 216.

protect the mortgagee's interest, and if a third party restore the loss the mortgagee cannot recover.¹ In Pennsylvania, where a mortgage is made to secure advances on a building and partly for the price of the land, the mortgagee can recover the whole insurance and is not obliged to look to the land.² And in Indiana, in *Ætna Ins. Co. v. Baker*,³ where the mortgagee took out a policy on his interest for the mortgagor's benefit under an agreement that the money shall be applied to reduce the debt, it was held no defence that the land without the buildings was security, or that the mortgagor had replaced them. In the Court of Appeals in England, in *Westminster P. Office v. Glasgow Provident Invest. Soc.*,⁴ A. insured bonds of his secured by realty, prior securities on the same premises having been given by the owner to other creditors, who had also insured in other offices. The prior creditors on a partial loss were paid enough to reinstate, but did not do so. Before the loss the realty was enough for all the bonds, but afterwards it was not enough for the balance of the prior securities and none for A.'s bonds; and it was held A. was entitled to recover in full.

A policy in which the mortgagee is named as the insured is not conclusive evidence that the mortgage debt alone is insured.⁵ Where the mortgagee procures a policy insuring the mortgagor "in case of loss, insurance to be paid to the mortgagee," the latter obtaining and paying the premiums on the policy with the mortgagor's consent, it was held that he could recover the interest of the mortgagor as well as his own.⁶

Where the policy issues to the mortgagor, loss payable to the mortgagee, and the property merges in the latter as owner, it has been held that he can recover in full.⁷ In *Bartlett v. Iowa State Ins. Co.*,⁸ the policy issued to the husband on property the wife held as mortgagee, the loss being made payable to her as mortgagee; after the loss the husband transferred the lot on which the building stood to her in consideration of the mortgage debt which

¹ *Friemansdorf v. Watertown Ins. Co.*, 9 Biss. 167 (N. D. Ill.).

² *Rex v. Ins. Cos.*, 2 Phila. 357.

³ 71 Ind. 102.

⁴ 13 Ap. Cas. 699.

⁵ *Thornton v. Enterprise Ins. Co.*, 71 Pa. St. 234.

⁶ *Chamberlain v. N. H. F. Ins. Co.*, 55 N. H. 249.

⁷ *Biddeford Sav. Bk. v. Dwelling-House Ins. Co.*, 81 Me. 566.

⁸ 77 Iowa, 86.

was cancelled; and it was held she could recover, as the transaction after the loss had not divested her right. It has been held a mortgagee of realty, owned by an infant, can recover on a policy securing the infant as owner, the loss being payable to the mortgagee; for if the mortgagee furnished proofs for both, and had authority to insure, he could recover, and if he had no power to insure for the infant's interest, the policy was good *qua* the mortgagee.¹

The mortgagee of a chattel may also insure,² though the mortgagor remain in possession; and where a mortgagor of a chattel insured, loss payable to the mortgagee, and the policy issued after the mortgagee's title had become absolute, the Court held the entire property was insured and not merely the mortgage interest.³

166. A pledge may be insured and a recovery had up to the pledgee's interest. For example, goods held as collateral under a warehouse receipt.⁴ And it has been held in Canada that the creditor who has insured property pledged for debt, and has been paid in part by receipt of insurance money, can only recover the balance due, including premium and interest.⁵

167. A lien is the subject of insurance.⁶ As for example, a lien on goods on board a ship,⁷ or a mechanic's lien may be insured.⁸ And where the material-man has a subsisting lien in the time intermediate between the furnishing of materials and filing of the claim he has an interest, though no claim of record be filed.⁹ One having a mechanic's lien on buildings erected on mortgaged land has an interest therein, limited by the value of the buildings and the amount of his claim against the owner of the equity of redemption; as what

¹ *Graham v. Phoenix Iron Co.*, 17 Hun (N. Y.), 156.

² *Ogden v. Montreal Ins. Co.*, 3 U. C. C. P. 497; *Crawford v. St. Lawrence Ins. Co.*, 8 U. C. Q. B. 135; *Scatcherd v. Equit. Fire Ins. Co.*, 8 U. C. C. P. 415.

³ *Smith v. Exchange F. Ins. Co.*, 8 J. & S. (N. Y.) 492.

⁴ *Wilson v. Cit. Ins. Co.*, 19 L. Can. J. 175. See *Stanton v. Aetna Ins. Co.*, 17 L. Can. J. 281.

⁵ *Archambault v. Lamere*, 26 L. Can. J. 236.

⁶ *Hart. Ins. Co. v. Haas*, 87 Ky. 531;

Parks v. Hart. Ins. Co., 100 Mo. 373; *Malcher v. King William's Town F. & M. Ins. Co.*, 3 Buchanan (Cape Good Hope), 271.

⁷ *Russell v. Union Ins. Co.*, 4 Dall. (Pa.) 421; *Hancox v. Fishing Ins. Co.*, 3 Sum. 132 (D. Mass.).

⁸ *Carter v. Humboldt F. Ins. Co.*, 12 Iowa, 287; *Stout v. City F. Ins. Co.*, 12 Ib. 371; *Franklin F. Ins. Co. v. Coates*, 14 Md. 285; *Ins. Co. v. Stinson*, 103 U. S. 25.

⁹ *Franklin F. Ins. Co. v. Coates*, 14 Md. 285.

he may realize is not material.¹ It has been held that it makes no difference if the lien-holder can pursue his debtor personally for the debt on account of which the lien attached;² or that subsequently to the loss he abandon the lien proceedings;³ or that a third party could set up a claim to defeat an interest on the lien from lapse of time.⁴ A judgment creditor with an attachment, followed by a levy begun but not completed, need not account to his debtor on a loss and payment of the policy money.⁵

It has been held the holder of a general bond has not a special interest in the property of his debtor not especially affected by the bond.⁶ But in Oregon it was held a general lien gave the creditor an interest, on the ground, as Deady, J., remarked, that "though he has no legal or equitable title to or interest in the property, he certainly sustains such a relation thereto that any injury to it would cause a corresponding loss to him; and nothing more than this can be said of the right of a mortgagee, mechanic, or even the legal owner to insure;" but the Court held that on a loss he must show that the debtor had not sufficient personalty out of which the debt could be satisfied.⁷ A creditor who had advanced the vendee part of the money to buy a mill in possession, with a warrant of attorney to dispose of it, was held to have interest.⁸ The right to individual advances made by trustees to a road held by them as trustees, was seemingly held not insurable till they are ascertained by a decree of the Court, as too uncertain.⁹ In the District of Arthabaska, Canada, it was held that a "creancier chirographaire" had not an insurable interest in the goods in the shop of his debtor.¹⁰

168. A carpenter or a builder erecting or repairing a building, to receive compensation on performance, has an interest.¹¹ And as a

¹ *Security F. Ins. Co. v. Ky. M. & F. Ins. Co.*, 7 Bush (Ky.), 81.

² *Hancox v. Fishing Ins. Co.*, 3 Sum. 132 (D. Mass.).

³ *Ins. Co. v. Stinson*, 103 U. S. 25.

⁴ *Hart. Ins. Co. v. Haas*, 87 Ky. 531.

⁵ *Internat. Trust Co. v. Boardman*, 149 Mass. 158.

⁶ *Malcher v. King William's Town F. & M. Ins. Co.*, 3 Buchanan (Cape Good Hope), 271.

⁷ *Spare v. Home Mut. F. Ins. Co.*, 8 Sawyer, 618 (D. Or.).

⁸ *Brugger v. State Invest. Ins. Co.*, 5 Saw. 304 (D. Or.). See *Malcher v. King William's Town F. & M. Ins. Co.*, 3 Buch. (Cape Good Hope) 271.

⁹ *Bishop v. Clay F. Ins. Co.*, 49 Conn. 167.

¹⁰ *Hunt v. Home Ins. Co.*, 3 Rev. Leg. (Can.) 455.

¹¹ *Protec. Ins. Co. v. Hall*, 15 B. Mon. (Ky.) 411.

rule, where a house is to be built for a fixed price payable in instalments, the contract is entire, and the builder has an interest till the completion of the job.¹ But the interest under a building contract does not include an interest in materials supplied to the builder which are not put on the building. Thus in *Eichelberger v. Miller*,² A. agreed with B. to do the carpenter's work on a dwelling-house about to be erected, all work to be paid for as it progressed by the architect's order to A. on B., who furnished the lumber, which was sent to A.'s shop to be prepared for the house, and B. insured. It was held the contract meant that A. should be paid only when the carpenter's work had actually been put on the house, and that B. was not liable to A. for money had and received, though he had insured and been paid for his lumber; though A. had also an interest in the lumber as bailee. A contractor moving another's portable house has an insurable interest.³

169. Where there is an annuity on land, the annuitant may insure the growing payments as well as the arrears.⁴ One who has given a bond for the forthcoming of a boat, which had been attached, and which was released and navigated under the authority of the bondsman, has an interest in the boat.⁵

170. A common carrier has an insurable interest in goods committed to him for carriage.⁶ But if for some reason the carrier would not be liable for the loss, it must appear that the insurance was intended to cover the shipper's interest in the goods, and not only the carrier's interest in them. Thus in *Duncan v. Sun Mut. Ins. Co.*,⁷ where a policy issued to a president of a railway company on merchandise in the depots, etc., with the goods in trust, etc., clause, and a customer had left a cargo of wine at the depot, which, after a due transportation by the company to wharves for shipping, was burnt, the railway company not being liable by the law for this loss, it was held, there being no evidence to show that

¹ See *Commer. F. Ins. Co. v. Capital City F. Ins. Co.*, 81 Ala. 320; *Superintendent of Public Schools v. Bennett*, 27 N. J. L. 513.

² 20 Md. 332.

³ *Planters & Merch. Ins. Co. v. Thurston*, 93 Ala. 255.

⁴ *Ex parte Day*, 7 Ves. 301.

⁵ *Firemen's Ins. Co. v. Powell*, 13 B. Mon. (Ky.) 311.

⁶ *Crowley v. Cohen*, 3 B. & Ad. 478; *Savage v. Corn Exchange F., Etc., Co.*, 4 Bos. (N.Y.) 1; *Chase v. Wash. Mut. Ins. Co.*, 12 Barb. (N.Y.) 595; *Lancaster Mills v. Merch. Cotton Press Co.*, 89 Tenn. 1.

⁷ 12 La. An. 486.

the customer's individual interest was covered, that his loss could not be indemnified, as the company was not liable. But in England, where a carrier, who was not liable for a loss on the goods shipped, because over the value of 10£ and not so declared, etc., by reason of the Carrier's Acts of 2 Geo. IV. and 1 Wm. IV., c. 68, had insured goods carried as his own and held in trust, etc., it was held he could recover on the particular shipper's goods, for though not legally responsible to the shipper by the Act, he might pay the shipper for the loss, and the shipper might very well have omitted to declare the value of his goods, relying on the policy, with which conduct the insurer had nothing to do.¹

171. So also an agent having the custody of goods and liable to account to his principal for goods may insure.² And he may do so in his own name either by a policy for whom it may concern, or as trustee.³ But a mere agent with no lien for advances or commissions and not having the custody or possession has no interest;⁴ as an agent without interest cannot insure on his own account,⁵ unless he states that he acts for his principal and is acknowledged by him.⁶ A bailee may insure up to his own interest, or, on stating it, as agent for others.⁷ So a commission merchant may insure the goods held on commission up to his interest,⁸ as well as take policies on goods in trust, etc., for his principal in his own name.⁹ So a consignee may insure up to his advances;¹⁰ or commission;¹¹ or

¹ *Lond. & N. W. R'y Co. v. Glyn*, 1 E. & E. 652.

² *O'Connor v. Imperial Ins. Co.*, 14 L. Can. J. 219; *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242; *Kline v. Queen Ins. Co.*, 7 Hun (N.Y.), 267.

³ *Sturm v. Atlan. Mut. Ins. Co.*, 63 N. Y. 77; *Bobbitt v. Lond. & Liv. & Globe Ins. Co.*, 66 N. C. 70; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Castner v. Farmers' Ins. Co.*, 46 Mich. 15.

⁴ *Seagrave v. Un. M. Ins. Co.*, L. R. 1 C. P. 305.

⁵ *Sawyer v. Mayhew*, 51 Me. 398.

⁶ *Freeman v. Fulton F. Ins. Co.*, 38 Barb. (N.Y.) 247.

⁷ *Stillwood v. Staples*, 19 N. Y. 401; *Hooper v. Robinson*, 8 Ins. L. J. (Md.) 497.

⁸ *Waring v. Indemnity F. Ins. Co.*, 45 N. Y. 606; *De Forest v. Fulton F. Ins. Co.*, 1 Hall (N.Y.), 84.

⁹ *Waring v. Indemnity F. Ins. Co.*, 45 N. Y. 606; *De Forest v. Fulton F. Ins. Co.*, 1 Hall (N.Y.), 84.

¹⁰ *Sargent v. Morris*, 3 B. & Al. 277; *Elsworth v. Alliance M. Ins. Co.*, L. R. 8 P. C. 596; *Wolff v. Horncastle*, 1 B. & P. 316; *Williams v. Crescent Ins. Co.*, 15 La. An. 651; *Hough v. People's F. Ins. Co.*, 36 Md. 399; *Hooper v. Robinson*, 8 Ins. L. J. (Md.) 497; *Bank v. Bicknell*, 1 Cliff. 85; *Aldrich v. Equit. Safety Ins. Co.*, 1 W. & Minot, 272; *Cusack v. Mut. Ins. Co.*, 6 L. Can. J. 97; *Shaw v. Ætna Ins. Co.*, 49 Mo. 578.

¹¹ *Ætna Ins. Co. v. Jackson*, 16 B.

even may insure goods on a voyage where a commission was expected and they had been consigned for sale and had been shipped to him.¹ Where, on instructions from the consignor to insure, the consignee insured in his own name, in a suit on the policy the latter was allowed to show he had insured as trustee for the consignor.²

It has been held a consignee may also by the clause, "goods his own or held in trust or on commission, or for whom it may concern," etc., protect his principal and recover on an averment of interest in his own name, holding all beyond his own claim as trustee for his principal.³ The leading American case of *De Forest v. Fulton F. Ins. Co.*,⁴ in the New York Superior Court, supports this doctrine. In Maryland the Court stated broadly the doctrine that one who has the custody, care, or possession as consignee may insure in his own name, though he has no pecuniary interest and is not responsible for its safe-keeping, provided there be a subsequent adoption by the consignor.⁵ And by a divided Court the English case of *Ebsworth v. Alliance M. Ins. Co.*,⁶ followed *De Forest v. Fulton F. Ins. Co.*,⁷ in the Court in banc, Bovil, C. J., and Denman, J., favoring the above rule, and Brett and Keating, JJ., dissenting, the Judges arguing the point with great ability. Arnould and Parsons also favored the above rule, while Duer doubted it.

The author of this treatise would, however, humbly suggest that the judgments in the above cases depend perhaps rather on a rule of convenience than a strictly logical principle of law. Of course, a consignee may insure his principal's goods up to his own interest; but with the title to the goods in the principal why may he insure and recover in his own name on behalf of his principal, because he himself happens to have also an interest in the pro-

Mon. (Ky.) 242; *De Forest v. Fulton F. Ins. Co.*, 1 Hall (N.Y.), 84. See *Bank v. Bicknell*, 1 Cliff. (D. Me.) 85; *Shaw v. Ætna Ins. Co.*, 49 Mo. 578.

¹ *Putnam v. Mercant. Ins. Co.*, 5 Met. (Mass.) 391.

² *Shaw v. Ætna Ins. Co.*, 49 Mo. 578.

³ *Ebsworth v. Alliance M. Ins. Co.*, L. B. 8 C. P. 596; *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242; *Hough v. People's F. Ins. Co.*, 36 Md. 399;

Hooper v. Robinson, 8 Ins. L. J. 497 (Md.); *Castner v. Farmers' Mut. F. Ins. Co.*, 46 Mich. 15; *De Forest v. Fulton F. Ins. Co.*, 1 Hall (N.Y.), 84; *Sturm v. Atlan. Mut. Ins. Co.*, 63 N. Y. 77. See *Bank v. Bicknell*, 1 Cliff. 1 (D. Me.).

⁴ *Supra.*

⁵ *Fire Ins. Ass'n v. Merch. & Miners' Transp. Co.*, 66 Md. 339.

⁶ L. R. 8 C. P. 596.

⁷ *Supra.*

perty of his principal? His liability to hand the surplus back to his principal is no answer in a Court of law, for with that the insurer has nothing to do. Where the consignee holds the bill of lading he is then the legal owner, and may possibly insure the whole property, but if a consignee without interest cannot insure at all, how then logically can one who happens to have an interest for advances, etc., insure beyond that? The case of carriers, of course, stands on a different basis, as they are themselves insurers and therefore have an interest in the whole amount. Possibly agents and consignees who must account for goods negligently lost may insure; but, admitting they could insure the whole amount, how could they recover beyond their liability to account?

Factors may insure up to their liens, etc.,¹ and likewise in own name and hold as trustees for their principal the surplus over their pecuniary interest.² And in Maryland, a factor who has no pecuniary interest may insure and hold for his principal.³ A warehouseman certainly in England, Maryland, and New York, and probably generally, can presumably insure the whole property and recover up to his claim or lien on the fund for himself and hold any surplus for owner.⁴ In *Baxter v. Hartford F. Ins. Co.*,⁵ Gresham, D. J., allowed the recovery in full of a loss on wheat by a warehouseman, on the ground that the warehouseman might own the whole of the wheat in a warehouse; for, though he was only liable to account for a certain amount, he was not bound to account for any specific wheat, and as it constantly shifted he would have an interest in all in the warehouse; and even if a particular depositor owned any specific wheat, a recovery lay, because the warehouseman could protect himself against the negligence of his employé; and apparently the Court thought the warehouseman could in any event recover to the full value of the wheat even if a depositor had an interest therein as owner to part of it. In *Ins. Co. v. Thompson*,⁶ where A. & Co. insured whiskey their own and held in trust, including the government tax thereon for which they might be liable, and for which were

¹ *Hooper v. Robinson*, 8 Ins. L. J. 497 (Md.).

² *Shoenfeld v. Fleisher*, 73 Ill. 404; *Castner v. Farmers' Mut. F. Ins. Co.*, 46 Mich. 15.

³ *Fire Ins. Ass'n v. Merch. & Miners' Trans. Co.*, 66 Md. 339.

⁴ See *F. Ins. Ass'n v. Merch. & Miners' Trans. Co.*, 66 Md. 339; *Forest v. Fulton F. Ins. Co.*, 1 Hall (N. Y.), 84; *Richmond v. Niag. F. Ins. Co.*, 79 N. Y., 230.

⁵ 12 Fed. R. 481 (D. Ind.)

⁶ 95 U. S. 547. See *post*, § 636.

so liable on the bond of the distiller in whose warehouse the whiskey was, and on a loss the money was paid apart from the tax. Subsequently judgment was obtained against A. & Co. on their bond for taxes, and in a suit against the insurance company it was held liable, as A. & Co.'s interest in the whiskey by reason of their liability to pay the government tax was insurable.

172. It has been held a receiver in a sound discretion without leave of Court may insure the property for the benefit of creditors.¹ So a receiver of property conveyed in fraud of creditors has interest, and he can hold the money against the creditors.² An assignee for the benefit of creditors or in bankruptcy may insure.³ And in Michigan, under the statute,⁴ after accepting the assignment he can insure before he has filed his official bond to protect the estate.⁵ But a defective assignment was held to give no title to the assignee.⁶ In a policy taken as "official assignee," an assignee subsequently appointed can recover.⁷ A trustee holding the legal title has interest.⁸ The purchaser of property in his own name for the benefit of another may insure, as he possesses the legal title against all the world except the equitable owner and his creditors.⁹ So a trustee in a deed of trust in the nature of a mortgage has an interest distinct from the mortgagor.¹⁰ And the conveyance of his interest by the mortgagor does not affect the right of the trustee of the mortgage to insure.¹¹ Where trustees had, by virtue of an Act of the Legislature, conveyed an asylum to the people of a locality, the people can take a policy for the benefit of the owners.¹² Where a number of the trustees of a church had

¹ *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287.

² *Lerow v. Wilmarth*, 9 Allen (Mass.), 382.

³ *Gill v. Can. F. & M. Ins. Co.*, 1 Ont. R. 341.

⁴ How. Stat., c. 303.

⁵ *Sibley v. Prescott Ins. Co.*, 57 Mich. 14.

⁶ *Parlee v. Agricult. Ins. Co.*, 3 Pug. (N. B.) 476.

⁷ *Elliott v. Nat. Ins. Co.*, 33 L. Can. Jur. 12.

⁸ *Re Yallop*, 15 Ves. 60; *Houghton v. Gribble*, 17 Ib. 251; *Bishop v. Clay F. & M. Ins. Co.*, 45 Conn. 430; *Keller*

v. Merch. Ins. Co., 7 La. An. 29; *Hooper v. Robinson*, 8 Ins. L. J. 497

(Md.); *Dick v. Franklin F. Ins. Co.*, 10 Mo. Ap. 376; *Babson v. Thomaston*

Mut. F. Ins. Co., 4 Ins. L. J. 50 (D. Me.) *Graham v. Fireman's Ins. Co.*, 2

Dis. (Oh.) 255; *Young v. Un. Ins. Co.*, 14 Ins. L. J. 793 (N. D. Ill.).

⁹ *Bicknell v. Lancaster City & Co. F. Ins. Co.*, 58 N. Y. 677.

¹⁰ *Dick v. Franklin F. Ins. Co.*, 10 Mo. Ap. 376; 81 Mo. 103.

¹¹ *Ib.*

¹² *Peoples v. Liv. & Lond. & Globe Ins. Co.*, 2 T. & C. (N. Y.) 268.

assented that a policy should issue on it for the benefit of a creditor of the church, who was also a trustee, and who kept the policy on foot out of his own funds, on account of the parish, the loss being made payable to still another trustee who was a creditor of the policyholder, though not of the church, it was held valid, as all the trustees had assented and it was immaterial to the company whether the payee kept the money or paid it over to the church.¹ It has been held an administrator cannot insure the realty of the intestate;² or renew one already taken out.³ But it has been said in New York that creditors had an interest in the buildings insured by an administrator, as they had a right to resort finally to a sale of the realty to pay their debts, though technically there was no lien; but the decision went on the ground that there might not be sufficient personalty, and that it was a benefit to the creditors to get this additional security.⁴ The opinion in the case by Denio, C. J., was able, and approved by the Supreme Court later in *Rohrbach v. Germania F. Ins. Co.*⁵ Where the estate is insolvent,⁶ or the personalty not enough to pay the debts,⁷ or where the executors are also devisees of the land, or have any charge in respect to the land, an interest would arise.⁸ In Michigan, a guardian, who was a widowed mother, for minor children, there being no guardian of their estate, was held to have an insurable interest.⁹

173. It has been held in Colorado that the sheriff has not an insurable interest in property seized in execution, and that the debtor is not liable for the cost of the premiums.¹⁰ In Pennsylvania, the sheriff is not absolutely liable for the forthcoming of property levied on by him under an execution, if deprived of it by sudden accident, as an escape in consequence of sudden fire.¹¹ Though where the sheriff left the goods in the debtor's custody, taking a receipt from

¹ *Ins. Co. v. Chase*, 5 Wall. 509.

(N. Y.) 404; *Colburn v. Lansing*, 46

² *Clinton v. Hope Ins. Co.*, Ins. L. J. (N. Y.) 436.

Barb. (N. Y.) 37.

³ *Beach v. Bowery F. Ins. Co.*, 8 Ab. Pr. (N. Y.) 261, n.

⁴ *Monaghan v. Agricult. F. Ins. Co.*, 53 Mich. 238.

⁵ *Herkimer v. Rice*, 27 N. Y. 163.

⁶ *Cramer v. Oppenstein*, 16 Colo. 495.

⁷ 62 N. Y. 47.

⁸ *Hartleib v. McLane*, 44 Pa. St. 510.

⁹ *Herkimer v. Rice*, 27 N. Y. 163.

See also dictum of Gibson, C. J., in

¹⁰ *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368.

Wheeler v. Hambright, 9 S & R. Pa. 390.

¹¹ *Phelps v. Gebhard F. Ins. Co.*, 9 Bos.

a third party for their delivery on the payment of the debt, it was held in New York that the return of "casually burned" did not exonerate him from liability.¹ But it has been held a sheriff has an insurable interest, as having a special property in the goods.² So, also, a deputy of the sheriff may insure for his principal, who may ratify it.³ It has, however, been held in New York that a sheriff's deputy cannot insure in a mutual company and give a premium note in the name of the sheriff, for, though the deputy can insure for his principal, he cannot make him the insurer of others in such a company.⁴

174. *A cestui que trust*, as well as the trustee, has interest in the trust estate.⁵ It has been held that an heir has an interest in land bought by an administrator at his own sale.⁶ An insolvent debtor retains an interest in goods concealed from his creditors.⁷ And an insolvent, who has in his possession goods vested in the provisional assignee, under 1 & 2 Vict.⁸ has still such an interest in such goods, as to maintain trover for them, and they are a means of paying his debts.⁹

175. Tenants in common having an interest in the whole subject may insure.¹⁰ An owner of oil in a tank in common with others has interest.¹¹ A partner has an insurable interest in the firm's entire stock of goods, and on receipt of the policy money must account to the firm.¹² A partner has interest in a building purchased with partnership funds, though standing on land owned by the other partner.¹³ So insurance may be effected in the name of a nominal partnership where the business is carried on for the use of one of the partners.¹⁴ But a partner or tenant in common can only recover up

¹ *Browning v. Hanford*, 5 Den. (N. Y.) 586; reversing same case in 5 Hill (N. Y.) 588; four Judges dissenting.

² *White v. Madison*, 26 N. Y. 117. See also *Perkins v. Proud*, 62 Barb. (N. Y.) 420.

³ *White v. Madison*, 26 N. Y. 117.

⁴ *White v. Madison*, 27 N. Y. 117.

⁵ *Boyd v. Blankman*, 29 Cal. 19.

⁶ *Riggs v. Commer. Mut. Ins. Co.*, 19 J. & S. (N. Y.) 466; *Phillips v. Knox Co. Mut. Ins. Co.*, 20 Oh. 174.

⁷ *Goulstone v. Royal Ins. Co.*, 1 F. & F. 276.

⁸ C. 110, s. 37.

⁹ *Marks v. Hamilton*, 7 Exch. 323.

¹⁰ See *Robertson v. Hamilton*, 14 East, 522; *Murray v. Columbian Ins. Co.*, 11 John. (N. Y.) 302.

¹¹ *West. & A. Pipe Lines v. Home Ins. Co.*, 145 Pa. St. 346.

¹² *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227; *Cowan v. Iowa State Ins. Co.*, 40 Iowa, 551.

¹³ *Converse v. Cit. Mut. Ins. Co.*, 10 Cush. (Mass.) 37.

¹⁴ *Phoenix Ins. Co. v. Hamilton*, 14 Wall. 504.

to his moiety, where he insures in his name only.¹ It has been held in a case in the Federal Court in Missouri that a shareholder in a private corporation has an insurable interest in the corporate property.² The same result was reached in Iowa.³ In Ohio it was asserted that a shareholder could not insure any corporate property of the corporation, as he did not hold it, but could insure only the stock; but it must be borne in mind that the argument of the Court in this last case was directed principally to the point that a lien was given by the charter of the underwriter on the property insured; which, of course, could not exist in the case, and also that the policy in any event was void by the charter, as the insured had not a title in fee.⁴ So that perhaps the rule asserted as to the point under discussion, towards the end of the opinion, is scarcely stronger than a dictum.⁵ In New York it was held that a shareholder has an interest in the corporate property.⁶ In Pennsylvania, in *Sweeny v. Franklin F. Ins. Co.*,⁷ a building insured by a shareholder was erected on land upon which the company had trespassed, and though he was a creditor and had a conveyance from the other shareholders, the Court denied his right to succeed, on the ground that the company had no interest in the building.

176. A turnpike company has no interest in a public county bridge on its line, but free to all travel, the county having paid in whole, or in part, for its erection.⁸ Where a house is erected by a lessee on another's land, and is treated as personalty, the owner of the land does not necessarily have an interest in it.⁹ Where, owing to an error in the survey, one built a house on adjoining lot, and subsequently sold it, as the Statute C. S. U. C. ch. 93, s. 53, allowed the builder, either the value of the improvements or the right to purchase at an assessed value, he was held to have an insurable interest.¹⁰

¹ *Dumas v. Jones*, 4 Mass. 647.

⁶ *Riggs v. Commer. Mut. Ins. Co.*,

² *Seaman v. Enterprise F. & M. Ins. Co.*, 18 Fed. R. 250 (E. D. Mo.); opinion by McCrary, J.

125 N. Y. 7.

⁷ 20 Pa. St. 337. See *post*, § 180.

³ *Warren v. Davenport F. Ins. Co.*, 31 Iowa, 464; *Wilson v. Jones*, L. R. 2 Exch. 139.

⁸ *Farmers' Mut. Ins. Co. v. New Holland Turnpike Co.*, 122 Pa. St. 37.

⁹ *Batcheller v. Commer. Un. Assur. Co.*, 143 Mass. 495.

⁴ *Phillips v. Knox Co. Mut. Ins. Co.*, 20 Oh. 174.

¹⁰ *Stevenson v. Lond. & Lancash. F. Ins. Co.*, 26 U. C. Q. B. 148.

⁵ *Ib.*

177. A tenant by the curtesy has interest in his wife's realty.¹ In most of the cases as to curtesy stress was laid on the fact that they lived on it together, but it is difficult to see how that can affect the question on principle. In *Eminence Mut. Ins. Co. v. Jesse*,² owing to the particular kind of title required by the charter of the insurance company to be in the insured, the husband's curtesy was held not insurable in that company. A husband may insure a dwelling he has erected on his wife's estate, which they both occupy, on a policy to a husband for the common benefit.³ In Iowa it was held a husband may insure a dwelling erected and occupied by both on his wife's land.⁴ So also, where the husband had erected a house on land of which his wife was tenant of one-third for her life and tenant in two-thirds for years.⁵ Where the husband conveyed to his wife under a parol agreement that she should, upon acquiring the legal title, convey back by a proper instrument to him a life estate in the land, and he remained in possession and received the proceeds, it was held he had interest, though no lease or conveyance had been executed by his wife to him.⁶ A wife, in whose employment her husband had been prior to her marriage, executed after her marriage a paper acknowledging a debt, stating it to be a lien on her property, and afterwards dying left but one piece of realty and personalty, which latter was insufficient for her debts, and it was held the husband had an interest in the realty, as he could enforce the document against it.⁷ In England, in *Goulstone v. Royal Ins. Co.*,⁸ it was held a husband had interest in goods settled to his wife's separate use, they residing together and sharing in the enjoyment of the property. And it has been held that a policy by the husband on his wife's furniture in their common dwelling was valid.⁹ In Michigan, however, the Court appears to have taken a

¹ *Trade Ins. Co. v. Barracliff*, 45 N. J. L. 543; *Franklin M. & F. Ins. Co. v. Drake*, 2 B. Mon. (Ky.) 47; *Harris v. York Mut. Ins. Co.*, 50 Pa. St. 341; *Uhler v. Farmers' Amer. F. Ins. Co.*, 4 Leg. Gaz. (Pa.) 354; *Mut. Ins. Co. v. Deale*, 18 Md. 26; *Traders' Ins. Co. v. Barracliff*, 45 N. J. L. 543.

² 1 Met. (Ky.) 523.

³ *Amer. Cent. Ins. Co. v. McLanathan*, 11 Kan. 533.

⁴ *Merrett v. Farmers' Ins. Co.*, 42 Iowa, 11.

⁵ *Abbott v. Hampden, Mut. F. Ins. Co.*, 30 Me. 414.

⁶ *Redfield v. Holland Purchase Ins. Co.*, 56 N. Y. 354.

⁷ *Rohrbach v. Germania F. Ins. Co.*, 62 N. Y. 47.

⁸ 1 F. & F. 276.

⁹ *Clarke v. Firemen's Ins. Co.*, 18 La. 431. In *Trade Ins. Co. v. Barracliff*,

contrary view, though it does not clearly appear whether there was a joint enjoyment.¹ And in Maine a husband has been held to have no interest in his wife's property conveyed by him to her.² Where a verbal gift from a wife to husband is bad, the husband holds as the wife's trustee, and may insure.³ In Louisiana the husband has the right to administer his wife's estate and an interest to insure it.⁴ In Indiana, since the Married Woman's Act,⁵ the husband has no insurable interest in his wife's estate.⁶ It was held in Alabama, where a husband, with the insurer's knowledge, insures above his partial or life interest, and the insurer takes a premium for a full interest, it cannot reduce a recovery to the life or partial interest, but a recovery lies for the full value.⁷

178. In Illinois, a married woman can insure her own real estate.⁸ In Louisiana, a married woman may insure property which she holds in her own name donated during marriage.⁹ It was also held in Illinois the widow's right to occupy the house formerly occupied by her husband and family, by virtue of a parol gift from her husband, and on which with her own money she had erected buildings, gave her interest.¹⁰ In New Brunswick, a widow having resided for four years in a house built on land of which her deceased husband had been lessee, insured in her own name, and there had been no administration taken out; it was held she had interest as presumptive owner as a widow under the statute, and as executrix *de son tort*.¹¹ In New York a mortgage duly executed by husband to his wife may be insured by her.¹² In Georgia the head of a family, out of whose property the homestead has been set apart, has interest.¹³

45 N. J. L. 543, there is a very exhaustive review of the authorities in support of this proposition. See also *Cohn v. Va. F. & M. Ins. Co.*, 3 Hughes, 272 (R. D. Va.).

¹ *Agricult. Ins. Co. v. Montague*, 38 Mich. 548.

² *Clark v. Dwelling-House Ins. Co.*, 81 Me. 373.

³ *Travis v. Continen. Ins. Co.*, 32 Mo. Ap. 198.

⁴ *Clarke v. Firemen's Ins. Co.*, 18 La. 431.

⁵ R. S. Ind. 1881.

⁶ *Traders' Ins. Co. v. Newman*, 120 Ind. 554.

⁷ *West. Assur. Co. v. Stoddard*, 88 Ala. 606.

⁸ *Commer. Ins. Co. v. Spankneble*, 52 Ill. 53; *Ely v. Ely*, 80 Ill. 532. See *ante*, § 16.

⁹ *Breard v. Mechan. & Traders' Ins. Co.*, 29 La. An. 764.

¹⁰ *Rockford Ins. Co. v. Nelson*, 65 Ill. 415.

¹¹ *Lingley v. Queen Ins. Co.*, 1 Han. (N. B.) 280.

¹² *Mix v. Andes Ins. Co.*, 9 Hun (N. Y.), 397.

¹³ *German-Amer. Ins. Co. v. Davidson*, 67 Ga. 11.

179. Where there is a common law or statutory liability to respond in damages for loss by fire on the property of another,¹ there would, no doubt, be an insurable interest in the one liable. For instance, the interest that is created under the statutory liability of railway companies for damages caused by fires kindled by the locomotives on property along the line of the railway.² In certain States, however, the statute gives the railroad specifically an interest in such property.³ In Maine the words of the statute,⁴ "when any injury is done to a building or other property, &c.," were held to include growing timber along the route, and the words "along its route," in the statute, included trees three hundred feet from the track.⁵ But in another case it was held that the act did not apply to movable property like cedar posts deposited temporarily along the route, and the railway company was, in such case, only liable for a loss caused by negligence.⁶

180. Profits to be derived from a sale of goods are insurable, for they form an additional part of the value of the goods in which the party has already an interest.⁷ Thus the owner of the goods on board a vessel may insure the profits to arise from them; and captors, because they have a lawful possession, coupled with a well-founded expectation that their claim to retain the goods will be allowed, and owners of slaves, or a captain in respect of his commission.⁸ An interest in the Atlantic cable, that is, the interest in the adventure or the profit to be derived by the insured from the success of the adventure, is insurable; though the company owned the cable, and the insured was a shareholder and would derive his profits from

¹ See, for instance, *Tubervil v. Stamp*, 1 Salk. 13; *Atkinson v. New-castle Waterworks Co.*, L. R. 6 Exch. 404; *Hooksett v. Concord R. R. Co.*, 38 N. H. 242; *Viscount Canterbury v. Att'y Gen'l*, 1 Phill. Ch. 306; *Jones v. Festing, R'way Co.* L. R. 3 Q. B. 733; *Hart v. West. R. R. Co.*, 13 Met. (Mass.) 99.

² *Monadnock R. R. Co. v. Mfrs. Ins. Co.*, 113 Mass. 77.

³ *Chapman v. Atlantic, Etc., R. R. Co.*, 37 Me. 92; *Pratt v. Ib.* 42 Me. 579; *Hooksett v. Concord R. R. Co.*, 38 N. H. 242.

⁴ Act. 1842, c. 9, sec. 5.

⁵ *Pratt v. Atlantic, Etc., R. R. Co.*, 42 Me. 579.

⁶ *Chapman v. Atlantic, Etc., R. R. Co.*, 37 Me. 92.

⁷ *Stockdale v. Dunlap*, 6 M. & W. 224; *Stock v. Inglis*, 12 Q. B. D. 564.

⁸ See also *Royal Exchange Assur. Co. v. McSwiney*, 14 Q. B. 646; *Barclay v. Cousins*, 2 East, 544; *Wilson v. Jones*, L. R. 2 Exch. 139; *Abbott v. Sebor*, 3 John, Cas. (N. Y.) 39; *Wells v. Phila. Ins. Co.*, 9 S. & R. (Pa.) 103.

dividends.¹ But where there is a mere engagement in honor to ship the goods and deliver them on arrival, but not a legal contract, there is no insurable interest in the buyers in profits, as the original contract was incapable of legal enforcement.² Nor would a mere moral certainty in a future venture be sufficient to give an interest.³ Rent is insurable.⁴ So are royalties, and consequently the party entitled to royalties from a business may insure the manufactory where such business is carried on.⁵

181. It is submitted a policy of fire insurance on a subject "lost or not lost" is valid, and a recovery lies though the loss may have taken place before the formation of the contract, if it were not known at the time to either party. This is certainly true of contracts as to marine and life risks. In *Earl of March v. Pigot*,⁶ two young heirs proposed to run their father's, Mr. Pigot's note ran, "I promise to pay to the Earl of March 500 guineas, if my father dies before Sir William Codrington, M. P.," and the Earl of March's ran, "I promise to pay Mr. Pigot 1600 guineas in case Sir William Codrington does not survive Mr. Pigot's father M." In point of fact, Mr. Pigot's father was actually dead before the match was made, though unknown to the parties. It was held by Lord Mansfield that the death before the contract was not material. He said: "It was not known that the father of either of them was then dead. Their lives, their healths were neither of them warranted nor excepted. It was equal to both of them, whether one of their fathers should be then sick or dead. All the circumstances show, that if it had been thought of, it would not have made any difference in the bet. . . . The intention was, that he who came first to his estate should pay this sum of money to the other who stood in need of it. That the event had happened was in the contemplation of neither party. Both notes are so penned as to be applied to what was to happen. But the nature of such a contract and the manifest intention of the parties support the verdict. That he who

¹ *Wilson v. Jones*, L. R. 2 Exch. 139. *Assur. Co.*, 2 Rob. (La.) 131; *Westminster F. Office v. Glasgow Provident*

² *Stockdale v. Dunlop*, 6 M. & W. Invest. Soc., 13 Ap. Cas. 699.

³ See *Lucena v. Craufurd*, 2 B. & P. Co., 34 Hun (N. Y.), 556.

(N. R.) 269.

⁵ 5 Burr. 2802.

⁶ *Baroness of Pontalba v. Phoenix*

succeeded to his estate first, by the death of his father, should pay to the other, without any distinction whether the event had or had not at that time actually happened." Later, Lord Denman in *Mead v. Davison*,¹ following the principle of *Earl of March v. Pigot*, said: "Now the case of the *Earl of March v. Pigot* is a direct authority in principle in favor of the right to recover, if the loss was known to neither party at the time of effecting the policy. According to the same case, and, indeed, on the plainest general principles, if the loss had been known to the assured only the policy would be void. But no case has determined that an underwriter who chooses to effect a policy, with full knowledge that the loss has actually happened, may not be bound by it. His conduct might indeed appear extraordinary, if it were not clear that he had a good legal consideration for entering into the contract, viz.: the payment of the premium, which may be regarded as a price actually given and received for the underwriters' indemnity against the contingency that has arisen;" and in *Sutherland v. Pratt*² Baron Parke held that it was no answer to an action on a policy on goods, "lost or not lost," that the interest in them was not acquired until after the loss, as such a policy is clearly a contract of indemnity against all past as well as all future losses sustained by the assured, in respect of the interest insured; and at the present time policies "lost or not lost" are usually recognized on marine risks as valid.³ While it is true that the authorities on this point are generally on marine contracts, still, the principle involved in them, as well as *Earl of March v. Pigot* (except, perhaps, as being a bet), apply to all insurance contracts. The contract, as is pointed out by Lord Denman, is legal, there is a consideration, and if it is the intention of the contract there is no reason why policies "lost or not lost" should not issue on all kinds of property; for, as Lord Mansfield observed, it is a mere question of intention; and contracts "lost or not lost" have been recognized in risks other than marine.⁴

182. It may be added that a joint policy by more than one has been upheld, though all cannot prove an insurable interest.⁵

¹ 3 A. & E. 303.

² 11 M. & W. 296.

³ See *Ark. Ins. Co. v. Bostick*, 27 Ark. 539; *Security F. Ins. Co. v. Ky. M. & F. Ins. Co.*, 7 Bush (Ky.), 81; *Marx v. Nat. M. & F. Ins. Co.*, 35 La. An. 39;

General Interest Ins. Co. v. Ruggles, 12 Wheat. 408.

⁴ *Security F. Ins. Co. v. Ky. M. & F. Ins. Co.*, 7 Bush (Ky.), 81.

⁵ *Perry v. Mechan. Mut. Ins. Co.*, 11 Fed. R. 478, 482 (D. R. I.).

There is no reason why the payee in a policy on property issued to the insured should have an insurable interest, unless it was so stipulated in the contract.¹ In *Franklin v. Nat. Ins. Co.*² it was held, on a demurrer, that an indorsement by the insurer that the loss on a policy to A. should be payable to B., imported that B. had an interest recognized by the insurer, though it was not decided whether it was needful to support the recovery.

DIVISION II.—IN RESPECT OF LIFE OR THE PERSON.

183. The contract of life insurance at the common law in its theory and structure is a wager.³ It is true that in *Godsall v. Boldero*,⁴ it was decided to be a contract of indemnity, but this was reversed in *Dalby v. India & London L. Assur. Co.*,⁵ which clearly re-established the common law principle. In referring to *Dalby v. India & Lond. L. Assur. Co.*, in *Law v. Lond. Indisputable L. Policy Co.*,⁶ Sir W. Page Wood, afterwards the Lord Chancellor Hatherly, observed at page 228, *Godsall v. Boldero* "was not a decision that met with universal approval, or in practice with acquiescence, though no doubt considered to be law. The decision of the Exchequer Chamber (*Dalby v. India & Lond. L. Assur. Co.*), independently of the high authority of that Court, appears to me to rest upon a right footing." . . . "Policies of insurance against fire or marine risks are contracts to recoup the loss which parties may sustain from particular causes. When such loss is made good *aliunde* the companies are not liable for a loss which has not occurred, but in a life policy there is no such provision. . . . It is simply a contract, that in consideration of a certain annual payment the company will pay at a future time a fixed sum, calculated by them with reference to the value of the premiums which are to be paid in order to purchase the postponed payment. Whatever may happen meanwhile is a matter of indifference to the company. They do not found their calculations upon that, but simply upon the probabilities of human life, and they get paid the full value of that calculation. On what principle can it be said, that,

¹ *Clay F. & M. Ins. Co. v. Huron Salt, Etc., Co.*, 31 Mich. 346.

² 43 Mo. 491.

³ See *ante*, §§ 4, *et seq.*

⁴ 9 East, 72. See also *Wittingham v. Thornborough Prec. in Ch.*, Case 21.

⁵ 15 C. B. 365.

⁶ 1 K. & J. 223.

if some one else satisfies the risk, on account of which the policy may have been effected, the company should be released from their contract? The company would be in the same position whether the object of the insured were accomplished or not; whether he were in a better or worse position, that could have no effect upon the contract with the company, which was simply calculated upon the value of the life which they had to insure."

The Statute, however, of 14 George III., c. 48, made it necessary in England for the insured to have an interest in the life.¹

184. It has been insisted, however, by several American Judges and text-writers, that at the common law the English Judges, with a few exceptions, declined at a certain period to recognize wagering contracts of insurance; that the Statute of 14 Geo. III. is simply declarative of the common law; and that while the contract of life insurance is not a contract of indemnity, and the principle of *Godsall v. Boldero* incorrect, still it has always been a contract requiring an interest.² But this is not tenable. There is no doubt in England, apart from the decision in *Dalby v. India & Lond. L. Assur. Co.*, contrary to a few of the older decisions, that marine wagers were generally made and recognized by the Courts as the subjects of insurance,³ until the practice was limited by the Act of

¹ *Dalby v. India & Lond. L. Assur. Co.*, 15 C. B. 365. See also *Lucena v. Craufurd*, 9 B. & P. N. R. 269; *Craufurd v. Hunter*, 8 T. R. 213; *Goram v. Sweeting*, 2 Saunders R. 200; *Park on Ins.* 140, n. In *Roebuck v. Hammerton*, Cowp. 737, a policy upon the sex of the Chevalier D'Eon was holden to be a policy within the statute. And it may be stated that in England every other aleatory contract in the form of a policy will be comprehended within it: *Bunyon on Insurance*, 12.

² For example, see *Whitmore v. Supreme Lodge*, 100 Mo. 36; *Ruse v. Mut. Benef. L. Ins. Co.*, 23 N. Y. 516, though in the latter case *Seldon, J.*, who delivered the opinion in 1861, cited no case in support of his theory, nor did he allude to *Dalby v. India & Lond. L. Assur. Co.*, 15 C. B. 365, decided in 1864, nor to the other cases supporting

the contrary view. See also *Alsop v. Commer. Ins. Co.*, 1 Sum. 451 (D. Mass.), in which *Story, J.*, remarked, "In Massachusetts, at least, the doctrine of *Goddart v. Garrett*, 2 Vern. 269, is in full force." But *Goddart v. Garrett* was criticised by the Judges in *Lucena v. Craufurd*, 2 B. & P. N. R. 321.

³ *Assievedo v. Cambridge* (A. D. 1710), 10 Mod. 77; *Dean v. Dicker* (A. D. 1746), 2 Strange, 1250; *De Paiba v. Ludlow*, 1 Comyns (A. D. 1721), 361; *Kent v. Bird*, 2 Cowp. 583; *Cousins v. Nantes*, 3 Taunt. 513; *Thellusson v. Fletcher*, 1 Dough. 315; Remarks of *Baron Parke* in *Dalby v. Ind. & Lond. L. Assur. Co.*, 15 C. B. 365; Remarks of *Kent, J.*, in *Abbott v. Sebor*, 3 John. Cas. (N. Y.) 44; *Arnould on Insurance* (6th Ed.), 123.

19 Geo. II., c. 37;¹ and this statute, which was limited to marine insurances, was held not to include policies of insurance on foreign cargoes or vessels.² And in Ireland it was held that a life policy was by the common law a wager and valid, and that the English Act of 14 Geo. III. did not extend to Ireland,³ though by the Act of 29 & 31 Vict.⁴ wagering life policies were invalidated in Ireland. It may be added that Mr. Bunyon, in his very able work on life insurance, written after *Godsall v. Boldero* was decided, but before it was reversed, was of the opinion that life insurances are wagers.⁵ Mr. Bliss does not express a decisive opinion, but quotes in section 8 of his Book the remarks of a contributor to the *Legal Magazine and Legal Review* of London, pages 193-4, in reference to the Act of 14 Geo. III., c. 48: "It is scarcely too much to say that in modern times it has never availed to prevent an illegitimate transaction, and has never been put in force except to evade a just claim." Mr. Cook, in his recent book on life insurance, is of the opinion that a life policy at the common law was a wager.⁶ Emerigon was also of the same opinion,⁷ and in certain countries they were forbidden as against public policy.⁸

The subject was very ably discussed in a case in New Jersey by Elmer, J., during the same year that *Dalby v. India & Lond. L. Assur. Co.* was decided, in which he, anticipating the result of that English Case before the decision was made known in the United

¹ See Remarks of Baron Parke in *Dalby v. India & Lond. L. Assur. Co.*, 15 C. B. p. 387.

² See *Craufurd v. Hunter*, 8 T. R. 13; *Nantes v. Thompson*, 2 East, 385; *Le Pyre v. Farr*, 2 Vern. 716; *Lucena v. Craufurd*, 2 B. & P. N. R. 269; *Cousins v. Nantes*, 3 Taunt. 513; Remarks of Blackburn, J., in *Mackenzie v. Whitworth*, 1 Exch. D. 36.

³ *British Commer. Ins. Co. v. Magee*, 1 Cooke & Alcock (Ir.), 182; *Shannon v. Nugent*, 1 Hayes (Ir.), 536; *Scott v. Roose*, 3 Ir. Eq. R. 170.

⁴ C. 42 (1866).

⁵ Bunyon on Life Insurance, p. 6 and further.

⁶ Cook on Life Insurance, § 58.

⁷ "At Naples, in Florence, in England

and various other places it is permitted to make insurances upon the lives of people; but these kinds of insurances are not properly so termed, they are really wagers." Emerigon on Insurances, by Meredith, p. 157.

⁸ The Civil Statutes of Genoa in 1588 forbade policies on the life of any constituted dignity, ecclesiastical or secular, without license from the State, and there was also a prohibition in France. See "Le Guidon." In Amsterdam an Ordinance in 1598, art. 24, forbade life insurance. See Fowler's History of Insurance, vi.-vii. It is asserted that life insurance in France was not allowed between 1681 and the latter part of the 18th century. See "Le Guidon."

States, in the course of his opinion said, "The case of *Godsall v. Boldero* is the leading case relied on to show that a contract of life insurance is simply a contract of indemnity, not only requiring an interest in the assured in order to give validity to it at its inception, but continuing good only so far as it is rendered so by the performance of such interest. This case has been since adhered to and has often been considered as founded on the common law, an impression to which some countenance is given by some of the language used by Lord Ellenborough in giving the opinion of the Court. It is evident, however, that the decision was not warranted by the common law, but by the Statute of 14 Geo. III., c. 48, which does not purport to be a declaratory act, but enacts in expression that no insurance shall be made on the life of any person wherein the person for whose use such policy shall have no interest, and that in all cases where the insured hath interest in the life, no greater sum shall be recovered or received from the insurers than the amount or value of the interest in the insured in such life. This statute not extending to Ireland, the Courts in that country held, in several recent cases, that at common law policies of insurance are valid without any interest.¹ No such statute exists in this State The American text-writers strongly favor the doctrine that wager policies should in all cases be held bad, upon general principles of policy and morality I confess, however, that whatever might be my opinion as to the expediency of a statute like that in England, before quoted, I must agree with the Irish Courts in holding that such is not the law Until the legislature shall think proper to interfere the Courts can only adhere to the common law as they find it established. To do otherwise would be an act of legislation, and not of judicial construction. It was insisted by counsel, and with much apparent force, that wagers on the life of a third person are in their very nature dangerous, and contrary to the policy and to sound morality. But the danger, if any exists, would apply with great, although not with equal force, to policies where there is an interest as well as to those where there is none Modern experience has proved the value of insurances upon the insured's life, or upon the life of another upon whom the insured may be dependent; or in whose life he has a real or supposed interest Upon a view

¹ See *supra*.

of the whole matter I think it admits of great doubt whether the English statute, by throwing impediments in the way of life insurances, and by raising questions often of difficult solution as to the nature and amount of the required interest, can be regarded as wise and salutary; at all events, in the absence of any such legislation here, I see no solid ground upon which we can safely depart from the doctrine of the common law, and upon reason of doubtful expediency hold a policy of life insurance to be something different from what it purports to be, that is to say, a contract to indemnify against loss, and not a contract to pay a given sum upon the happening of a particular event."¹ In *Rhode Island v. Mowry v. Home L. Ins. Co.*,² Potter, J., seemed to entertain very much the same opinion. Chancellor Walworth was also of the opinion that a wagering life policy was valid at the common law.³

185. It may be laid down as the nearly universal rule that at the present time, either by statute or judicial decision, an interest is necessary to support a life policy.⁴ And it may also be asserted with the same universality that the Courts have decided that a life policy is not a contract of indemnity.⁵ The question then arises to what extent interest must exist in a contract of life insurance.

186. In England the statute makes it essential that some interest should exist, but it is sufficient to meet the requirements of the

¹ *Trent. Mut. L. & F. Ins. Co. v. Johnson*, 4 Zab. (N. J.) 576. See also *De Ronge v. Elliott*, 8 Green (N. J.), 486.

² 9 R. I. 354.

³ *Leonard v. Eagle L. & Health Ins. Co.*, 1 Liv. U. S. L. Mag. (N. Y.) 286. See also *St. John v. Amer. Mut. L. Ins. Co.*, 2 Duer (N. Y.), 419.

⁴ See *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 35; *Smith v. Pinch*, 80 Mich. 332; *Whitmore v. Supreme Lodge*, 100 Mo. 36; *Burbage v. Windley*, 108 N. C. 357; *Fox v. Penn Mut. L. Ins. Co.*, 4 Big. L. & Ac. Cas. 458 (Pa.); *Ulrich v. Reinoehl*, 143 Pa. St. 238; *Roller v. Moore*, 86 Va. 612; *Crotty v. Un. Mut. L. Ins. Co.*, 144 U. S. 621. In *Elkhart Mut. Aid Ass'n v. Houghton*, 98 Ind. 149, it was held interest

must exist in a life policy in a mutual aid society as well as in any other corporation. In *U. B. Mut. Aid Soc. v. McDonald*, 122 Pa. St. 324, it was stated that where there is no interest, the motive in procuring a policy is not material.

⁵ *Dalby v. India & Lond. L. Assur. Co.*, 15 C. B. 365; *Trenton Mut. L. & F. Ins. Co. v. Johnson*, 4 Zab. (N. J.) 576; *De Ronge v. Elliott*, 8 Green (N. J.), 486; *Rawls v. Amer. Mut. L. Ins. Co.*, 27 N. Y. 282; *Mut. L. Ins. Co. v. Allen*, 13 Ins. L. J. 897 (Mass.); *Scott v. Dickson*, 108 Pa. St. 6; *Corson's Ap.*, 13 Pa. St. 438; *Mowry v. Home L. Ins. Co.*, 9 R. I. 346; *Conn. Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457; *Warnock v. Davis*, 104 U. S. 775.

statute if it exists at the inception of the contract.¹ Though it must be pecuniary, and no ties of blood or affection are sufficient. The interest must arise out of some subsisting right of property, which may be prejudicially affected by the occurrence of the event assured against, and which, whether in possession, in reversion, or contingent, would give the assured a standing in a Court of equity if the title was in question.² And an insurance against death by accident is within the Act of 14 Geo. III.³

In *Carbill v. Carbolic Smoke Ball Co.*,⁴ the proprietors of a medical preparation called the Carbolic Smoke Ball agreed to pay £100 to any one who should contract influenza after using one of their pills for a certain period, and on the faith of this statement the plaintiff bought some, but fell ill of the influenza notwithstanding. It was attempted by the defence to avoid the contract on account of its being a wagering contract of insurance, but the Court held it was not a wager within 8 & 9 Vict., c. 109; nor a policy of insurance within 14 Geo. III., c. 48, s. 2, which only applied to a written

¹ *Dalby v. India & Lond. L. Assur. Co.* 15 C. B. 365. The Statute of 14 Geo. III., c. 48, enacted: "I. Whereas it hath been found by experience that the making insurances on lives or other events wherein the assured shall have no interest, hath introduced a mischievous kind of gaming, for remedy whereof be it enacted by the King's most excellent majesty, by and with the advice and consent of the Lords, Spiritual and Temporal, and Commons in the present Parliament assembled, and by the authority of the same. That from and after the passing of this Act, no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any or other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaining or wagering, and that every assurance contrary to the true intent and meaning hereof shall

be null and void to all interests and purposes whatsoever."

"II. And be it further enacted, that in all cases where the insurer hath an interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or the insurers than the amount or value of the interest of the insured in such life or lives, or other event or events."

IV. "Provided always, that nothing herein contained shall extend to or be construed to extend, to insurance *bona fide* made by any person or persons on shipped goods or merchandise, but every such insurance shall be as valid and effectual in the law as if this Act had not been made."

² *Bunyon on Life Assurance*, 14. See *Halford v. Kymer*, 10 B. & C. 724; *Hebden v. West*, 3 B. & S. 578; *Shilling v. Accidental Death Ins. Co.*, 27 L. J. Exch. 16.

³ *Shilling v. Accidental Death Ins. Co.*, 1 F. & F. 116.

⁴ [1892] 2 Q. B. 484.

policy. The Court very possibly did not consider this a contract of insurance.

187 In the United States, it has been generally held that the interest need only exist at the inception of the contract, but not at the falling in of the life.¹ And as the American Courts have likewise usually held it not to be a contract of indemnity, the Judges have been somewhat embarrassed to give an accurate definition of an insurable interest; and as Potter, J., remarked in *Mowry v. Home L. Ins. Co.*,² "have left it very much undefined. The reasons generally given for requiring an interest as matter of public policy do not seem very forcible . . . it is almost impossible to estimate exactly the interest one has in the life of another." Shaw, J., in *Loomis v. Eagle L. & Health Ins. Co.*,³ laid down the rule thus: "It must appear that the insured has some interest in the life of the *vestui que vie*; that his temporal affairs, his just hopes and well-grounded expectations of support, of patronage, and advantages in life will be impaired; so that the real purpose is not a wager, but to secure such advantage, supposed to depend on the life of another; such, we suppose, would be sufficient to prevent it from being regarded as a mere wager. Whatever may be the motive of such intent, and whatever the amount insured, it can work no injury to the insurers, because the premium is proportioned to the amount, and whether the insurance be a large or small amount the premium is computed to be a precise equivalent for the risk taken. We cannot doubt that a parent has an interest in the life of a child, and, *vice versa*, a child in the life of a parent, not merely on the ground of a provision of law that parents and grandparents are

¹ *Guardian Mut. L. Ins. Co. v. Hogan*, (N. Y.) 434; *Scott v. Dickson*, 108 Pa. 30 Ill. 35; *Johnson v. Van Epps*, 14 St. 6; *Collamer v. Day*, 2 Vt. 144; *Brad. (Ill.)* 201; *Franklin L. Ins. Co. Conn. Mut. L. Ins. Co. v. Schaefer*, 94 v. Hazzard, 2 Ins. L. J. (Ind.) 180; U. S. 457. *Quere* in Rhode Island, Mo. Val. L. Ins. Co. v. McCrum, 36 *Mowry v. Home L. Ins. Co.*, 9 R. I. 346; Kan. 146; *Rombach v. Piedmont & Clark v. Allen*, 11 R. I. 439. In New Arlington L. Ins. Co., 35 La. An. 233; Jersey by the common law an interest *Loomis v. Eagle L. & Health Ins. Co.*, need not exist; *Trenton Mut. L. & F. Ins. Co. v. Johnson*, 4 Zab. (N. J.) 6 Gray (Mass.), 396; *Lord v. Dall*, 12 576. See also *De Ronge v. Elliott*, 8 Mass. 115. In New York after a conflict the point was settled in accordance C. E. Gr. (N. J.) 486. with the general rule in America in ² 9 R. I. 346. *Ruse v. Mut. Ben. L. Ins. Co.*, 23 N. Y. ³ 6 Gray (Mass.), 396. 516. See also *Mount v. Waite*, 7 John.

bound to support their lineal kindred when they may stand in need of relief, but upon considerations of strong morals and the force of natural affection between near kindred, operating often more efficaciously than those of positive law." These remarks were cited with approval by Bradley, J., in the Supreme Court of the United States, though at the same time that Judge laid down a very vague rule: "Precisely," he said, "what interest is necessary in order to take a policy out of the category of a mere wager has been the subject of much discussion. In marine and fire insurance the difficulty is not so great, because there insurance is considered as strictly an indemnity. But in life insurance the loss can seldom be measured by pecuniary values. Still, an interest of some sort in the insured life must exist. A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him. It is well settled that a man has an insurable interest in his own life, and in that of his wife and children; a woman in the life of her husband; and the creditor in the life of his debtor. Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. And there is no doubt that a man may effect an insurance on his own life for the benefit of a relation or friend, or two or more persons on their joint lives for the benefit of the survivor or survivors. The old tontines were based substantially on this principle, and their validity has never been called in question. The essential thing is, that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest."¹ In *Warnock v. Davis*,² Field, J., laid down some rules at page 779, to the following effect: "It may be stated generally, however, to be such an interest arising from the relations of the party obtaining the insurance, either as creditor or surety for the assured, or from the ties of blood or marriage to him as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation;

¹ Conn. Mut. L. Ins. Co. v. Schaefer, ² 104 U. S. 775.
94 U. S. 457.

for a parent has an insurable interest in the life of his child, and a child in the life of his parent; a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful, as operating more efficaciously to protect the life of the insured, than any other consideration. But in all cases there must be a reasonable ground, founded on the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured." This was approved by the Supreme Court of Pennsylvania in *Corson's Appeal*.¹ But these definitions are for the most part dicta, are not altogether supported by the American authorities, and sometimes the rules contained in these dicta have been repudiated by the judgments of the Courts. We must therefore examine in detail the principles on which the judgments of the Courts have been based, and conclude with Hoar, J., that in America, "the question, what is such an interest in the life of another as will support a contract of insurance upon the life, is one to which a complete and satisfactory answer, resting upon sound principles, can hardly yet be said to have been given."²

188. It has been held that one has an insurable interest in his own life;³ and it has also been held the presumption is that a policy taken out by a party on his own life is for himself.⁴

189. A creditor has an insurable interest in the life of a debtor.⁵ And the general rule is that if an interest exist at the inception it need not continue during the insurance, but the creditor can recover the insurance money in full and need not account to the debtor's representatives, provided the policy was not a cover for a wager.⁶

¹ 113 Pa. St. 438-444.

² *Forbes v. Amer. Mut. L. Ins. Co.*, 15 Gray (Mass.), 249.

³ *Bloomington Mut. Benf. Ass'n v. Blue*, 120 Ill. 121; *Scott v. Dickson*, 108 Pa. St. 6; *N. Amer. L. Assur. Co. v. Craigen*, 6 R. & G. (N. S.) 440.

⁴ *Valton v. Nat. Loan Fund L. Assur. Soc.*, 22 Barb. (N. Y.) 9.

⁵ *Anderson v. Edie*; *Park on Ins.* 432; *Stackpole v. Simon*, *Ib.* 437; *Curtiss v. Aetna L. Ins. Co.*, 90 Cal. 245; *Martin v. Stubbings*, 126 Ill. 387; *Rittler v. Smith*, 70 Md. 261; *Parks v.*

Conn. F. Ins. Co., 26 Mo. Ap. 511; *Mace v. Provident L. Ass'n*, 101 N. C. 122; *Ulrich v. Reinoehl*, 143 Pa. St. 238; *Brockway v. Mut. Ben. L. Ins. Co.*, 9 Fed. R. 249 (W. D. Pa.).

⁶ *Hodge v. Ellis*, 76 Ga. 272; *Guardian M. L. Ins. Co. v. Hogan*, 30 Ill. 35; *Amick v. Butler*, 111 Ind. 578; *Rittler v. Smith*, 70 Md. 261; *Rawls v. Amer. Mut. L. Ins. Co.*, 27 N. Y. 282; *Amer. L. & Health Ins. Co. v. Robertshaw*, 26 Pa. St. 189; *Corson's Ap.*, 113 Pa. St. 438; *Grant v. Kline*, 115 Pa. St. 618; *Keystone Mut. Ben. Ass'n v. Nor-*

For instance, the creditor can recover though the debt is barred, when the life falls in, by the Statute of Limitations.¹ Nor would the discharge of a debtor in bankruptcy and partial payment be material.²

If, however, there is such a disproportion between the amount of the debt and the amount of the insurance as shows that the policy was not taken as security for a debt, but as a wager, the American Courts have usually held that the insured cannot recover. Though what the test is has not been clearly stated. Probably the clearest view upon this subject is to be had from a perusal of the opinion of Paxson, C. J., in *Ulrich v. Reinoehl*.³ The rule in that case, which is admitted by the Chief Justice not to be absolutely satisfactory, appears to be that a creditor may insure a debtor's life in an amount sufficient to cover the debt and interest, together with the premiums of insurance which may fall due during the period of the debtor's expectancy of life in accordance with standard life tables; and the fact that the cost of assessment insurance cannot be precisely calculated as insurance for cash premiums, does not create an exception to the rule, but in such a case a reasonable approximation may be made. In accordance with the above rule, while a policy in \$3000 to secure a debt of \$100 may, as a matter of law, be declared void if unexplained, evidence may be adduced to show it to be a legitimate transaction. And the proportion between the debt and the insurance at the inception of the contract, and not that which may exist at the time the "life" falls in, is the test of the legality of the transaction. The fact whether the creditor gains or loses on the speculation is not material.⁴

In some of the States, however, the creditor appears to be able only to retain the amount the debtor may owe him at the latter's death, with disbursements for the insurance.⁵ Though, so far as the insurer is concerned, the creditor is entitled to the policy money above the debt, which he must, however, account for to the debtor's

ris, 115 Ib. 446; *Levy v. Taylor*, 66 Tex. 652; *Langdon v. Un. Mut. L. Ins. Co.*, 235, 14 Fed. R. 272 (E. D. Mich.); *Stevenson v. Cotton*, 18 Scot. Jur. 465.
¹ *Rawls v. Amer. Mut. L. Ins. Co.*, 27 N. Y. 282.

² *Ferguson v. Mass. Mut. L. Ins. Co.*, 32 Hun (N. Y.), 306.

³ 143 Pa. St. 238. See *post*, § 312.

⁴ See also *Alexander v. Sanders*, 93 Ala. 345; *Shaffer v. Spangler*, 144 Pa. St. 223.

⁵ *Schonfield v. Turner*, 75 Tex. 324.

representatives.¹ In the Code of Lower Canada, Act 2592, it was provided: "The measure of the interest insured in a life policy is the sum fixed in the policy, except in the cases of insurance by creditors, or in other like cases in which the interest is susceptible of exact pecuniary measurement. In these cases the sum fixed is reduced to the actual interest."²

190. The creditor not unusually makes an agreement with the debtor as to the insurance; as that the debtor shall procure and keep on foot the policy, after payment of the debt, and that the debtor's representatives shall get the proceeds,³ or that the creditor shall keep it up and be reimbursed when the debt is paid or the life falls in; or that the debtor shall procure one solely for the creditor's benefit. The question frequently arises as to whether, under the agreement, the creditor or the debtor's representatives are entitled to the surplus, if there be any, after payment of the debt, and this depends upon the terms of the agreement. If it appears that the policy was taken merely as collateral security to secure the payment of the debt, the balance, if any, on the debtor's death, or payment of the debt, should revert to the debtor or his representatives.⁴ But if it be shown that the policy was taken to enure to the benefit of the creditor and not merely for his protection, the creditor would be entitled to the balance after payment of the debt.⁵ It is not necessarily a vital fact in whose name the policy has been taken, though it has been held that if the claimant has paid the premium a *prima facie* case has been made out.⁶

In *Bruce v. Garden*,⁷ an army agent insured in his own name the life of an officer, his debtor, and charged on his books the officer with the premiums paid and interest on the balance, including the premiums, the officer knowing of the policies, but not of the book charges, and Lord Hatherley, C., held, reversing James V. C., that the army agent was not liable to account, for "the Court requires distinct evidence of a contract that the creditor has agreed to effect

¹ *Equit. L. Ins. Co. v. Hazlewood*, 75 Tex. 338.

² See, however, *Archambault Galarneau*, 22 L. Can. J. 105.

³ *Amer. L. & Health Ins. Co. v. Robertson*, 26 Pa. St. 189.

⁴ *Simpson v. Walker*, 2 L. J. n. s.

Ch. 55; *Tatum v. Ross*, 150 Mass. 440. See *post*, § 313.

⁵ *Ala. Gold L. Ins. Co. v. Anderson*, 11 Ins. L. J. 329 (Ala.).

⁶ *Pfeger v. Browne*, 28 Beav. 391; *Lewis v. King*, 44 L. J. Ch. 259.

⁷ 5 Ch. Ap. 32.

a policy, and the debtor has agreed to pay the premiums, and in that case the policy will be held in trust for the debtor.”

In *Freme v. Brade*,¹ A., being unable to pay the premiums on policies effected by him on his own life, gave to B. a post obit bond for £14,000, payable on the death of his father, if A. should survive him, and if B. kept up the policies, which sum was fixed on a basis as proper to keep up the policies, and also to keep up policies on A.’s life, payable in the event of his dying in his father’s lifetime; A. knew of all this and that B. intended to insure A., but B. had not agreed to do so. A. died before his father and appointed B. his executor. Held that no contract to insure by B. had been proved, therefore B., and not the estate of A., was entitled to the policy.

In *Forrester v. Robson’s Trustee*,² two trading companies obtained in the name of a common partner in both firms an advance from an insurance office, repayable by instalments upon the security of a policy on the life of the partner, payable to him, his executors, &c., he being the youngest in either firm. The companies paid the premiums, and it was held the balance after payment of the debt belonged to the firm, and not to the representatives of the deceased partner. In *Lewis v. King*,³ a debtor arranged for the payment of his debts by instalments, to be secured by life policies to be effected by his creditors, who were to pay the premiums and assign the policies on payment of their debt and expenses. All the instalments but the last were paid, and another premium becoming due the creditors offered to assign the policy to the debtor on repayment of the premiums with interest, which was declined, and the creditors paid the premium and then the debtor paid the last instalment due. Shortly afterwards, on the debtor’s death, his executrix claimed the policy money, but it was held she was not entitled to it, as this was clearly a creditor’s policy, to become the debtor’s only on a contingency, and the debtor had declined to avail himself of his option. But in *Drysdale v. Piggot*,⁴ where a debtor and a surety signed a bond to secure payment of a debt by instalments, and the expenses of a policy taken on the debtor’s life in the creditor’s name as security, and neither the debtor nor the surety paid the premiums,

¹ 2 DeG. & J. 582.

² 44 L. J. Ch. 259.

³ 2 C. S. C. (4 Ser.) 755.

⁴ 8 DeG. M. & G. 546.

though requested by the creditor, who then paid them, it was held on the debtor's death that neither the surety nor the debtor had abandoned the policy, but that it was redeemable by the surety on repayment of the premiums, for if the creditor chooses to keep up a debtor's security he must be understood as keeping it up for the debtor's benefit.

191. In a grant of an annuity, which is an absolute sale, a right of repurchase simply does not raise the relation of debtor and creditor; the grantee is at liberty to insure or not; it is a distinct contract which diminishes his profits to the extent of the premiums, and the object of an insurance in the case of an annuity is to indemnify the grantee against the premature death of the grantor; and if the grantee chooses to insure the grantor's life as an additional security, the policy does not constitute a security in which the grantor has any right or interest.¹ Where it was agreed by the grantee when the annuity "came to be paid off," and "as soon as the annuity was redeemed," that he would assign the policy taken by him on the grantor's life, to the latter, and the grantor died without redeeming, it was held his representative was not entitled to the produce of the policy's surplus beyond the redemption money; for death ended the annuity, and then it was too late.² Where the grantee of an annuity insured the life of the grantor at his own expense, the grantor having the power of redemption with the option "at the time of making such repurchase," to take any policy "then vested" in him which might be effected, it not being incumbent on the grantee to keep on foot any policy, it was held on the grantor's election to take the policy that the grantee could not surrender it for his own profit, though he was not compelled to keep it up.³ If the relation of debtor and creditor between the grantor and grantee of the annuity is indisputable, and the policy is only made to secure the debt, the grantor's representatives would be entitled to the policy moneys.⁴ Where an insurer purchases an annuity, and the grantor agreed that the insurer should

¹ See *Preston v. Neele*, 12 Ch. D. 760; *Morland v. Isaac*, 20 Beav. 389; *Knox v. Turner*, 5 Ch. Ap. 515; *Law v. Warren*, 6 Ir. Eq. 299; *Lyon v. McKlew*, 1 C. S. C. (1st Ser.) 47.

² *Bashford v. Cann*, 33 Beav. 109.

³ *Hawkins v. Woodgate*, 7 Beav. 565.

⁴ *Preston v. Neele*, 12 Ch. D. 760; *Courtenay v. Wright*, 2 Giff. 337. See *Williams v. Atkyns*, 2 J. & Lat. (Ir.) 603; *Kavanagh v. Waldron*, 9 Ir. Eq. 279.

retain out of the security all sums paid for additional premiums by the insurer in case the grantor should go beyond the seas, if it should insure, it was held where the insurance company had not paid the extra premiums that it could not retain the money, though the life had gone beyond the seas, in the case where the company had not insured, except so far as being its own insurer in a branch of its business.¹

192. Sureties in official bonds have an interest in the life of the obligor.² And a surety in an official bond may recover the insurance on death, though no breach has occurred at this date.³ It was thought by Justice Buller that a policy to secure the note of an infant was valid, because the note might be affirmed on the infant's coming of age.⁴ And it has been held in South Carolina, that one who supplies an infant with necessaries may insure the life of the infant with his consent, upon paying the premiums and taking the policy in his or their name, and recover up to the debt.⁵ A creditor of a firm has interest in the life of a partner, though the other partner may be solvent and able to pay the debt, and may recover from him the amount insured.⁶ But where A. and B. insured in the firm's name of A. and B., the life of D. their debtor, and of C. their partner, to which last D. was not indebted, it was held such insurance in the three names was bad, as D. was only indebted to A. and B.⁷ So it has been held that one member of a firm has interest in the life of a firm debtor to the extent of the debt.⁸ Where on the formation of a firm each partner was to furnish a quota of capital, when one fails to do so, the other may insure his life.⁹ So where one advances money to another for an outfit, etc., to labor or to trade with, and has a contingent interest in the result, as a share in the proceeds, this gives interest.¹⁰ An employer liable to his work-

¹ *Grey v. Ellison*, 1 Giff. 438.

⁷ *Barron v. Fitzgerald*, 6 Bing. N. C.

² *Branford v. Saunders*, 25 W. R. 201.

650; *Scott v. Dickson*, 108 Pa. St. 6.

³ *Kennedy v. N. Y. L. Ins. Co.*, 10 La. An. 809.

⁴ *Scott v. Dickson*, *ib.*

⁵ *Dwyer v. Edie*, Park on Insurance, 432.

⁹ *Conn. Mut. L. Ins. Co. v. Luchs*, 108 U. S. 798.

⁶ *Rivers v. Gregg*, 5 Rich. Eq. (S. C.) 274.

¹⁰ *Bevin v. Conn. Mut. L. Ins. Co.*, 23 Conn. 244; *Miller v. Eagle, L. & Health Ins. Co.*, 2 E. D. Sm. (N. Y.) 268; *Hoyt v. N. Y. L. Ins. Co.*, 3 Bos. (N. Y.) 440; *Leonard v. Eagle L. & Health Ins.*

⁸ *Morrell v. Trenton Mut. L. & F. Ins. Co.*, 10 Cush. (Mass.) 282.

men by common law or statute, for the safety of his employés, has interest in the latter's lives. In Louisiana it was held a legal claim for services rendered, or even a reasonable expectancy from family relations to receive a pecuniary advantage, would give interest.¹ It has been held an assignee in insolvency has no interest in the life of the bankrupt, at least after his discharge.² It has been held a contract with a beneficiary society to furnish support, medical attendance, burial, is an insurable interest in the life.³ A theatrical manager has interest in the life of the actor engaged by him.⁴ In a suit for redemption by the husband of a wife's chose in action after her death, not reduced into possession during his wife's lifetime, which he and his wife had pledged to B. as security for a debt, B. having insured the wife's life, it was held that the husband could not recover. For to do so B. must possess an interest in the wife's life, but at her death his interest ceased. That is to say, the only interest B. had was in case she survived her husband, but as the wife died first, he had no longer an insurable interest. And the fact that the money was paid by the office to B. gratuitously gave the debtor no right to have it applied in reduction of his debt.⁵

193. It has been stated in America that insurable interest is only implied from relationship where the insured has a legal claim upon the "life" for services or support,⁶ or perhaps when, from personal relationship, the insured has a reasonable expectation of pecuniary advantage or loss from his death.⁷ In Pennsylvania it is probable that marriage gives interest.⁸ In Vermont the interest of the husband in the wife was put on the ground of his right to her services, and it was held the presumption is that she is healthy in

Co., 4 Liv. U. S. Law Mag. 286; Morrell v. Trenton Mut. L. & F. Ins. Co., 10 Cush. (Mass.) 282. See Loomis v. Eagle L. & Health Ins. Co. (6 Gray, Mass.), 396.

¹ Rombach v. Piedmont & Arlington L. Ins. Co., 35 La. An. 233.

² Re McKinney, 15 Fed. R. 535 (S. D. N. Y.).

³ McArthur v. Chase, 6 Cent. R. 596 (Pa.).

⁴ 22 Law Mag. (Lond.) n. s. 347.

⁶ Henson v. Blackwell, 4 Hare, 434.

⁶ See Rombach v. Piedmont & Arlington L. Ins. Co., 35 La. An. 233; Charter Oak L. Ins. Co. v. Brant, 47 Mo. 419; Keystone Mut. Ben. Ass'n v.

Norris, 115 Pa. St. 446.

⁷ U. B. Mut. Aid Soc. v. McDonald, 122 Pa. St. 324; Rombach v. Piedmont & Arlington L. Ins. Co., 35 La. An. 233.

⁸ Keystone Mut. Ben. Ass'n v. Norris, 115 Pa. St. 446.

body and mind.¹ In England it was held a wife will be presumed to have an interest in her husband.² In Pennsylvania, apparently, a wife has an interest in her husband's life.³ In Missouri the statute gives interest,⁴ and possibly she has this interest by the common law.⁵ In a case in Missouri it was considered that the husband could at common law insure for the benefit of his wife.⁶ But this seemed to be doubted in *Charter Oak L. Ins. Co. v. Brant*,⁷ a later case, and it was said the right depended on the statute. But still later, in *Gambs v. Covenant Mut. L. Ins. Co.*,⁸ it was again asserted the husband before the statute could have insured for the benefit of his wife. In New York a wife has an interest at common law in the life of her husband.⁹ And the reputed husband of a wife, whose first husband is living, may take out a policy for her, though the marriage is thus illegal, and the former husband subsequently turns up, but does not claim the wife.¹⁰ In Missouri, in *Holabird v. Atlantic Ins. Co.*,¹¹ it was decided, as no particular form of marriage is required, and the mere living together coupled with reputation constitutes a marriage, that where the deceased husband had a wife, but lived with the beneficiary, and later after the death of his wife continued to live as a husband with his former mistress, she became his wife and acquired an interest in his life. In England, the mere fact of relationship gives no interest in a father to insure his son's life when adult.¹² But in Pennsylvania,¹³ as well as New York,¹⁴ there are dicta that a father has an interest in an adult child's life. So also, in Massachusetts in *Loomis v. Eagle L. & Health Ins. Co.*,¹⁵ there is a dictum to the same effect.

¹ *Currier v. Continen. L. Ins. Co.*, 57 Vt. 496.

² *Reed v. Royal Exchange Assur.*, Peake's Addit. Cas. 70.

³ *Corson's Ap.* 113 Pa. St. 438; *Key-stone Mut. Ben. Ass'n v. Norris*, 115 Pa. St. 446.

⁴ *Charter Oak L. Ins. Co. v. Brant*, 47 Mo. 419.

⁵ *McKee v. Phoenix Ins. Co.*, 28 Mo. 383; *Gambs v. Covenant Mut. L. Ins. Co.*, 50 Mo. 44.

⁶ *McKee v. Phoenix Ins. Co.*, 28 Mo. 383.

⁷ 47 Mo. 419. See *Yeager v. Ib.*, 5 Ins. L. J. 238.

⁸ 50 Mo. 44.

⁹ *Thompson v. Amer. Tontine L. & Savings Ins. Co.*, 46 N. Y. 674.

¹⁰ *Equit. L. Assur. Soc. v. Paterson*, 41 Ga. 338.

¹¹ 2 Dill. 166 (E. D. Mo.).

¹² *Worthington v. Curtis*, 1 Ch. D. 419; *Halford v. Kymer*, 10 B. & C. 724.

¹³ *Corson's Ap.*, 113 Pa. St. 438.

¹⁴ *Grattan v. Nat. L. Ins. Co.*, 15 Hun (N. Y.), 74.

¹⁵ 6 Gray (Mass.), 396.

Nor has a father in England any interest in an adult daughter's life.¹ The argument has, however, been frequently made, that the statutory liability imposed on a son to support his father gives an interest to the father in the life of the son. This was pressed in *Holford v. Kymer Co.*,² but the Judges said the parish was bound to maintain him, and it was legally indifferent to him whether he was kept by the son or the parish. But it has been more than once held that a father may insure the life of a minor child, as he is entitled to his services.³ In England,⁴ and in some of the United States, a son is held not to have an insurable interest in his father's life as such.⁵ In Illinois a well-grounded expectation of some pecuniary advantage, however, will, it is said, give the son interest.⁶ In Pennsylvania it was held a child has an interest in a parent's life, as under the poor laws he was liable to support his father, and he may thus reimburse himself.⁷ In Missouri, a father by statute may insure for the benefit of his children.⁸ In New York in a lower Court a policy by a son on his father's life was held valid.⁹ A stepson has no interest in the life of a stepfather.¹⁰ Nor a son-in-law interest in the life of his mother-in-law.¹¹ In Indiana it was stated a grandfather residing with a grandson may insure for the latter's benefit.¹² It has been held that an old woman, who lived with her daughter and the father of the daughter's husband, who had promised to keep her for life, had an interest in the old woman's life.¹³ The relationship of brother and sister does not, without more, give interest.¹⁴ But where a sister is dependent on

¹ *Innes v. Equitable Assur. Co.*, cited in *Bliss on Insurance*, sec. 10.

² 10 B. & C. 724.

³ *Loomis v. Eagle Life & Health Ins. Co.*, 6 Gray (Mass.), 396; *Mitchell v. Un. L. Ins. Co.*, 45 Me. 104; *Grattan v. Nat. L. Ins. Co.*, 15 Hun (N. Y.), 74.

⁴ *Shilling v. Accidental Death Ins. Co.*, 1 F. & F. 116.

⁵ *Contin. L. Ins. Co. v. Volger*, 89 Ind. 572; *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 35.

⁶ *Guardian Mut. L. Ins. Co. v. Hogan*, *supra*.

⁷ *Reserve Mut. L. Ins. Co. v. Kane*, 81 Pa. St. 154.

⁸ *Charter Oak L. Ins. Co. v. Brant*, 47 Mo. 419.

⁹ *Tucker v. Mut. Benef. L. Co.*, 50 Hun (N. Y.), 50.

¹⁰ *U. B. Mut. Aid Soc. v. McDonald*, 122 Pa. St. 324.

¹¹ *Stambaugh v. Blake*, 22 W. N. C. (Pa.), 407; *Stoner v. Line*, 16 Ib. 187.

¹² *Elkhart Mut. Aid Ass'n v. Houghton*, 103 Ind. 286.

¹³ *Batdorf v. Fehler*, 16 Ins. L. J. 692 (Pa.).

¹⁴ *Lewis v. Phoenix Mut. L. Ins. Co.*, 39 Conn. 100. See *Forbes v. Amer. Mut. L. I. Co.*, 15 Gray (Mass.), 249.

her brother for support, or where the relation of debtor and creditor may be raised,¹ this is sufficient interest. The rule, as laid down by the Supreme Court of the United States in *Ætna L. Ins. Co. v. France*,² seems to be that a brother may take out a policy on his own life for his sister as payee, nor is it material who pays the premiums, but the jury should say whether such a policy was a wager. The relation of nephew and uncle or aunt does not raise the implication of interest, unless there be a pecuniary interest besides.³ A betrothed lady in Pennsylvania has probably an interest in the life of her intended.⁴ And in Missouri this has been so decided.⁵

194. As a general rule the insured may make a party who has no insurable interest the beneficiary or payee of a policy.⁶ Though apparently it has been held in Michigan and Texas that the payee must have an interest;⁷ and there is a dictum to the same effect in the Supreme Court of the United States,⁸ though perhaps not intended to convey that idea, but to mean that any party not interested may be payee in a policy, if there is no presumption of a wager; and the relationship of the parties in the case at bar rebutted any such

¹ *Keystone Mut. Ass'n v. Beaverson*, *Knights of Pythias*, 52 N. J. L. 455; 16 W. N. C. (Pa.), 188; *Lewis v. Valton v. Nat. Loan Fund L. Assur. Phoenix Mut. L. Ins. Co.*, 39 Conn. Soc., 22 Barb. (N. Y.) 9; *Scott v. 100. See Goodwin v. Mass. Mut. L. Ins. Dickson*, 108 Pa. 6; *Fairchild v. Co.*, 73 N. Y. 480; *Barnes v. Lond. North East Mut. L. Ass'n Co.* 51 Vt. 613; *Ingersoll v. Knights of Golden Rule*, 47 Fed. R. 272 (S. D. Ga.); [1892] 1 Q. B. 864.

² 94 U. S. 561.

³ *Corson's Ap.*, 113 Pa. St. 438; *Singleton v. St. Louis Mut. Ins. Co.*, 66 Mo. 63. (N. D. Iowa); *Langdon v. Un. Mut. L. Ins. Co.*, 14 Fed. R. 272 (R. D. Mich.); *N. Amer. L. Assur. Co. v. Craigen*, 13 Duv. (Can.) 278; *N. Amer. L. Assur. Co. v. Craigen*, 6 R. & G. (Nov. Scot.) 440. But see *Meily v. Hersberger*, 16 W. N. C. (Pa.) 186; *Kohr v. Wolf*, 16 Ib. 189, apparently to the contrary, possibly because the beneficiary paid the premiums, and it was considered a wager.

⁴ *Corson's Ap.*, 113 Pa. St. 438.

⁵ *Chisholm v. Nat. Capitol L. Ins. Co.*, 52 Mo. 213.

⁶ See *Wainwright v. Imperial L. Ins. Co.*, 1 M. & Rob. 481; *Goodrich v. Treat*, 7 Ins. L. J. 269 (Colo.); *Johnson v. Van Epps*, 110 Ill. 551; *Bloomington Mut. L. Ben. Ass'n v. Blue*, 11 N. East. R. 331 (Ill.); *Provident L. Ins. & Invest. Co. v. Baum*, 29 Ind. 236; *Succession of Hearing*, 26 La. An. 326; *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 381; *Vivar v. Mut. Ben. Ass'n v. Hoyt*, 46 Mich. 473; *Goldbaum v. Blum*, 79 Tex. 638. ⁷ *Ætna L. Ins. Co. v. France*, 94 U. S. 561.

presumption. In Texas, apparently, the want of insurable interest in the payee cannot be relied on by the insurer as a defence, but the right to the money must be settled between the holder of the policy and the representatives of the insured.¹

195. Certain forms of contracts of insurance have also been held wagers. In Alabama A. became a member of an association which paid marriage benefits, by the rules of which he was not to receive any benefit if he married in less than three months, but after that period he was to receive a monthly payment. He named B. as beneficiary. The members of the society paid marriage assessments, and it was also agreed that B. should pay the dues, &c., and that the member or insured should receive one-third of the proceeds of the certificate when paid. The insured married and demanded payment, which was refused on the ground that B. was the payee; but the transaction was held a wagering contract.² In Indiana the company agreed to pay a certain sum of money to the payee on his marriage to a lady named, provided the payee gave exclusive right to the company to carry the "marriage benefit insurance" on him and his betrothed, and it was held the condition giving such exclusive right was a wager and the whole contract illegal.³

In Illinois an agreement of a beneficial company to pay, on the death of the insured, to a designated beneficiary seventy-five per cent. of the money raised by voluntary contributions and twenty-five per cent. to the two members whose names might chance to hold the certificates next above or below the deceased, was held to be a wager.⁴ Apparently a Tontine policy, however, is not a wager.⁵

196. If the insurance is void because a wager, but the insurer gratuitously chooses to pay the insured's payee, he can retain the money.⁶ In Pennsylvania, however, it is held that where the insurer pays the policy money on a wager policy to the payee, the executor of the insured can recover it from the payee.⁷ But it was

¹ *Pacif. Mut. L. Ins. Co. v. Williams*, 79 Tex. 633.

² *White v. Equit. Nuptial Benefit Un.*, 76 Ala. 251.

³ *James v. Jellison*, 94 Ind. 292.

⁴ *Golden Rule v. People*, 115 Ill. 492.

⁵ *Simons v. N. Y. L. Ins. Co.*, 38 Hun (N. Y.), 309.

⁶ *Henson v. Blackwell*, 4 Hare, 434; *Worthington v. Curtis*, 1 Ch. D. 419.

⁷ *Meily v. Hershberger*, 16 W. N. C. (Pa.) 186; *Kohr v. Wolf*, 16 Ib. 189.

also held by that Court that the executor, and not the widow or heir, must act in the matter, for the contract is not void *ab initio*; and where the insurer pays on such a policy to the payee, after a notice from the widow and heir, though not from the executor, not to pay, it cannot be held liable a second time to pay the executor.¹ In a case in Vermont A. loaned money to B., taking his note with usurious interest and a policy on the debtor's life, in a much larger amount than the amount actually loaned in his own name. The company paid the creditor the policy money, and it was held A. must pay the money above the legal debt over to B.'s representatives; for, though the insurance company might have resisted the payment to A. of any sum over the actual debt, still, as it did not do so, A., as against B.'s representative, could not do so, having received it from the company.²

It is difficult to support these rulings on any principle. It is not easy to understand why a party, who has made a bet and paid the consideration the other party requested, may not retain the fruits of his bet, if the latter makes no objection to pay it. Nor is there any very obvious moral reason why the money honorably paid on a lost bet should be forcibly taken from the pocket of the winner and given to another who, from inability or timidity, did not care to make it, and possibly did not know of its being made.

197. With regard to the burden of proof. There must be an averment and some proof of interest, both in suits on fire and life policies.³ It has been held in Massachusetts, Missouri, Wisconsin, and Western Virginia, with respect to fire policies, where the declaration alleges an interest and the application or policy shows an interest in the insured, that this is a *prima facie* case.⁴ In Missouri, in *Parks v. Conn. Ins. Co.*,⁵ it was stated that the payee had

¹ *Bomberger v. United Breth. Mut. Soc.*, 18 W. N. C. (Pa.) 459. *v. Peabody Ins. Co.*, 21 W. Va. 368; *Caulfield v. Watertown F. Ins. Co.*, 55 Wis. 419.

² *Coon v. Swan*, 30 Vt. 6.

³ *Lewis v. Phoenix Mut. L. Ins. Co.*, 39 Conn. 100; *Penn. Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92; *Nichols v. Fayette Mut. L. Ins. Co.*, 1 Allen (Mass.), 63; *Parks v. Conn. Ins. Co.*, 26 Mo. Ap., 511; *Singleton v. St. Louis Mut. Ins. Co.*, 66 Mo. 63; *Planters' Ins. Co. v. Diggs*, 8 Bax. (Tenn.) 563; *Sheppard*

⁴ *Nichols v. Fayette Mut. F. Ins. Co.*, 1 Allen (Mass.), 63; *Parks v. Conn. Ins. Co.*, 26 Mo. Ap. 511; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Caulfield v. Watertown F. Ins. Co.*, 55 Wis. 419.

⁵ 26 Mo. Ap. 511.

prima facie interest, if the policy was made payable to her. In life policies it has been held in Connecticut that where the declaration avers an interest and an interest also appears from the application or policy, it is sufficient.¹ The facts tending to show interest are for the jury.²

¹ *Lewis v. Phoenix Mut. L. Ins. Co.*, 32 Iowa, 421; *Bankhead v. Des Moines Ins. Co.*, 30 N. W. R. 740 (Iowa); 39 Conn. 100.

² *Guardian Mut. L. Ins. Co. v. Hogan*, *Shaak v. Meily*, 26 W. N. C. (Pa.) 563. 80 Ill. 37; *Mitchell v. Home Ins. Co.*,

CHAPTER V.

THE CONSIDERATION, OR PREMIUM.

	SECTION		SECTION
Its character	198	Agent's power to accept another	
Not necessarily precedent	198	medium than money	201
But may be made so	199	Or give credit	201
Medium of payment	200	Transmission of premium by mail	201
Need not necessarily be money	200		

198. The last essential element to the formation of the contract of insurance is the price, or, as it is usually termed, the premium. The price may be cash, or in mutual companies the formation of the contract may be performed by the insured paying partly in cash and giving a note for the balance, or, giving a note and paying no cash at all, though even in mutual companies the price may be wholly in cash.¹ But it is not necessary to complete the formation of the contract that the price should be paid, but it is complete without it, unless specially made precedent to its formation by the parties.² Nor need the premium note be signed;³ though when signed it usually constitutes with the policy, and often the application, evidence of the whole contract.⁴

199. The price may, however, be made precedent, and then its

¹ See *ante*, § 11. Also *Spruance v. 82; Commer. Mut. M. Ins. Co. v. Un. F. & M. Ins. Co.*, 9 Colo. 73; *State v. Mut. Ins. Co.*, 19 How. 328; *Whitaker Manfg. Mut. F. Ins. Co.*, 9 Mo. 311; *v. Farmers' Un. Ins. Co.*, 29 Barb. (N. Y.) 312; *Campbell v. Amer. F. Ins. Co.*, Co., 2 Pear. (Pa.) 428. 73 Wis. 100.

² See *New Eng. F. & M. Ins. Co. v. Robinson*, 25 Ind. 536; *Western Mass. Ins. Co. v. Duffey*, 2 Kan. 347; *Blanchard v. Waite*, 28 Me. 51; *Brownfield v. Phoenix Ins. Co.*, 35 Mo. Ap. 54; *Trustees First Baptist Church v. Brooklyn F. Ins. Co.*, 19 N. Y. 305; *Kelly v. Commonw. Ins. Co.*, 10 Bos. (N. Y.)

³ *Commer. Mut. M. Ins. Co. v. Un. Mut. Ins. Co.*, 19 How. 318.

⁴ See *Shultz v. Hawkeye Ins. Co.*, 42 Iowa, 239; *Amer. Ins. Co. v. Stoy*, 41 Mich. 385; *West. Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289; *Fuller v. Madison Mut. Ins. Co.*, 36 Wis. 599.

payment is essential.¹ In *Baxter v. Massasoit Ins. Co.*,² where the agent had prepared the policy and taken it to deliver to the insured and get the money, but not being able to find him took it away, it was left to the jury to say whether the policy had been executed and held for the benefit of the insured, so that he should have an opportunity to pay the premium and take the policy, and whether the insured could have a reasonable time within which to pay; or whether payment was precedent. But where the agent of the company on a tender of the policy to the insured demanded the premium, but was referred by him to a third party who had previously agreed with the insured to pay it, and the agent replied he would call on this third party, but never did and retained the policy, it was held not to be a contract, for the policy was not to take effect till paid for.³ Where the rules of a railway benefit association authorize a member's dues to be collected by the stoppage of monthly wages of the servants of the railway company, it was held that a declaration of the railway company's paymaster, who was not a servant of the benefit association nor had himself made the deduction, nor knew the date on which it was made, but did a purely ministerial act in paying money when ordered to, was insufficient to establish the membership of a railway employé in such association.⁴

200. While the price is usually money, or a note representing money, this is not essential, but the parties may agree that it shall be made in another commodity, or in services.⁵ Where the premium is money, the tender to be good must be in the legal coin or currency of the realm or commonwealth, and the money should be produced; but the party to whom the tender is made may make it valid, when it would be otherwise insufficient, by objecting on a different ground,

¹ *St. Louis Mut. L. Ins. Co. v. Kennedy*, 6 Bush (Ky.), 450; *Wallingford Co. v. Ward*, 90 Ill. 545; *Willcuts v. Home Mut. F. & M. Ins. Co.*, 30 Mo. 46; *Collins v. Ins. Co.*, 7 Phila. 201; *Mattoon Mfg. Co. v. Oshkosh Mut. F. Ins. Co.*, 69 Wis. 564. See *ante*, § 12.

² 13 Allen (Mass.), 320.

³ *Hoyt v. Mut. Benef. L. Ins. Co.*, 98 Mass. 539.

⁴ *Balto. & Oh. Employés' Relief Ass'n v. Post*, 122 Pa. St. 579.

⁵ See *Carter v. Cotton States L. Ins.*

Co., 56 Ga. 237; *Lycoming F. Ins. Co. v. Ward*, 90 Ill. 545; *Willcuts v. Northw. Mut. L. Ins. Co.*, 81 Ind. 300; *Ky. Mut. Ins. Co. v. Jenks*, 5 Ind. 96; *Buckner v. Grosvenor, Bliss on Insurance*, § 280 (Oh.); *Bank v. Ger. Amer. Ins. Co.*, 72 Wis. 535; *Hoffman v. John Hancock Mut. L. Ins. Co.*, 92 U. S. 161; *Carlwitz v. Germania F. Ins. Co.*, 12 Ins. L. J. 127 (D. N. J.); *Frazer v. Gore, District Mut. F. Ins. Co.*, 2 Ont. R. 416.

as, for example, to the amount, but not the character of the offer.¹ It has been held that the payment otherwise valid when made to an agent of a Northern man in the Confederate States during the American Civil War, might be made in the currency there used.²

201. As the usual payment is money, an agent would not, unless expressly or impliedly empowered, be authorized to accept any medium of payment but money.³ In *Lycoming F. Ins. Co. v. Ward*,⁴ the agent had insured the applicant in two companies he represented, and the payment had been made without appropriating any part of the money partly in cash and partly in segars, drinks, etc. In a suit against the defendant company, it appeared that the cash was more than the amount of its premium, and it was held that the defendant was bound.

Where a mutual company was allowed by a supplement to its charter to insure "for a specified rate of premium to be paid in cash in the same manner as insurance companies," not mutual, "are accustomed to do," it was held that the company might accept a note for such premium, instead of cash, the taking of it being a mere extension of time of payment, and none the less a cash payment.⁵ Where the premium is to be cash the authority of the agent to receive credit or a note must be shown,⁶ and probably authority would have to appear for an agent to accept a check in payment.⁷ As a general rule, payment must be actually made, and the mere giving the money to one's agent to pay is not sufficient; but where the insurer has instructed the insured to send his check, it was held that a transmission by mail was sufficient, though it did not arrive till after the loss.⁸

¹ *Polglass v. Oliver*, 2 Cr. & J. 15; *Hancock Mut. L. Ins. Co.*, 92 U. S. 161.
² *Ward v. Smith*, 7 Wall. 447.

³ *Martine v. Internat. L. Assur. Soc.*, 62 Barb. (N. Y.) 181. ⁴ 90 Ill. 545.

⁵ *Carter v. Cotton States L. Ins. Co.*, 56 Ga. 237; *Lycom. F. Ins. Co. v. Ward*, 90 Ill. 545; *Willcuts v. Northw. Mut. L. Ins. Co.*, 81 Ind. 309; *Anchor L. Ins. Co. v. Pease*, 44 How. Pr. (N. Y.) 385; *Buckner v. Grosvenor*, Bliss on Ins. § 280 (Oh.); *Hoffman v. John*

⁶ *Casey v. Nagle*, 2 Abb. C. C. 156 (Wis.).

⁷ *Walker v. Provincial Ins. Co.*, 8 U. C. Ch. 217.

⁸ *Tayloe v. Merch. F. Ins. Co.*, 9 How. 390.

⁹ *Ib.*

BOOK II.

RIGHTS OF THE PARTIES IN THE CONTRACT BEFORE THE CONTINGENCY INSURED AGAINST OCCURS.

PART I.

RIGHTS OF THE INSURED.

CHAPTER I.

ALIENATION OR DIMINUTION OF THE INSURED'S INTEREST AFTER THE FORMATION OF THE CONTRACT.

	SECTION		SECTION
In insurance in respect of property		The words "sale," "alienation,"	
there must be a <i>dilectus personæ</i>	202	etc., in the clauses are used in	
Insured cannot recover after a di-		the popular sense . . .	213
vestiture of interest . . .	202	Effect of a mortgage . . .	213
But a diminution of interest does		Of the appointment of a receiver .	213
not bar recovery . . .	203	An absolute conveyance may be	
Aliter if a clause against . . .	203	shown to be a mortgage . . .	214
Sales of property and sales of inter-		Effect of foreclosure . . .	215
ests in it distinguished . . .	203	Of a lease	216
Various clauses against sales, etc.	204	Clauses against incumbrances .	217
Sale to mortgagee	205	Effect of a mortgage	217
Motive not material	205	Of a judgment	218
Sale for taxes	205	Of a foreclosure	219
Sale on a condition	206	Foreclosure sale, to avoid, must be	
Uncompleted sale	206	complete	220
Executory sale	206	An outstanding equity of redemp-	
Voidable sale	207	tion	220
Sale and vendor's lien	208	Levy of execution on personalty .	221
Sale and mortgage for the price .	208	The proceedings under a foreclo-	
Sale and judgment	209	sure or levy must be regular .	222
Sale and lease	209	Sales by partners	223-224
Assignment in insolvency	210	Insurances on shifting stocks of	
Bankruptcy	211	merchandise, etc.	225
Devolution of the property on		Voluntary incumbrances	226
death	212	Construction where it is doubtful	

	SECTION		SECTION
if the clauses refer to a transfer		Notice to the insurer on an alien-	
of the interest or of the policy	227	ation	231
Policies on an alienation confirmed		Assent by the insurer to the alien-	
to the alienee	228	ation	231
Duties of the alienee in such a		Burden of proof	231
case	229-230	Jury	231

202. As has been stated,¹ an insurance in respect of property is not an insurance of the specific thing mentioned in the policy, but is an agreement insuring the person taking out the policy against damage or prejudice to his interest in the thing described.² There is almost necessarily in this form of contract a *dilectus personæ*, and the policy does not attach to the specific thing named in it, nor does it pass as an incident in a sale or transfer.³ Therefore, if the insured part with his interest in the property insured he cannot recover on a loss.⁴ For example, in *Sadler's Co. v. Badcock*,⁵ where a lessee, who had insured, assigned to his landlord his policy, on the expiration of the lease, which ran for a longer period than the lease, it was held the landlord could not recover on a loss. So in *Heller v. Royal Ins. Co.*,⁶ where a tenant had insured against liability for rent during the period the premises might be untenable from fire, and on a loss the landlord agreed to rebuild and make a new lease, the tenant agreeing, on his part, that the landlord's entry to rebuild should not constitute an eviction, and to pay rent during the rebuilding under the original lease, it was held the entry, nevertheless,

¹ Ante, § 2.

² See *Sadler's Co. v. Badcock*, 2 Atk. 554; *Lynch v. Dalzell*, 4 Brown P. C. 431; *New South Wales Bank v. North Brit. & Mercant., Etc., Co.*, 2 New South Wales L. 239; *North of England Oil Co. v. Archangl. Ins. Co.*, L. R. 10 Q. B. 249; *Garland v. Ins. Co. of N. A.*, 9 Brad. (Ill.) 571; *McCluskey v. Providence Wash. Ins. Co.*, 126 Mass. 306; *Morrison v. Tenn. M. & F. Ins. Co.*, 18 Mo. 262; *Jecko v. St. Louis F. & M. Ins. Co.*, 7 Mo. Ap. 308; *Lahiff v. Ashuelot Ins. Co.*, 13 Ins. L. J. 796 (N. H.); *Ætna F. Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385; *Howard v. Albany Ins. Co.*, 3 Den. (N. Y.) 301; *Mount Vernon*

Manfg. Co. v. Summit Co. Mut. F. Ins. Co., 10 Oh. St. 347; *Hoxsie v. Providence Mut. F. Ins. Co.*, 6 R. I. 517; *Hobbs v. Memphis Ins. Co.*, 1 Sneed (Tenn.), 444; *Carpenter v. Providence Wash. Ins. Co.*, 16 Peters, 495; *Forgie v. Royal Ins. Co.*, 16 L. Can. J. 34.

³ See *Ib.*

⁴ *North Brit. & Mercant. Ins. Co. v. Moffatt*, L. R. 7 C. P. 25; *Minturn v. Mfrs. Ins. Co.*, 10 Gray (Mass.), 501; *Perry v. Mechan. Mut. Ins. Co.*, 11 Fed. R. 478 (D. R. I.).

⁵ 2 Atk. 554.

⁶ 133 Pa. St. 152. But see the more recent decision in *Heller v. Royal Ins. Co.*, 30 W. N. C. (Pa.) 545.

relieved the insurer from paying, as the lease was *pro tanto* rescinded by the landlord's entry to rebuild, and the insurer could not be damaged by any arrangement so as to change the effect of such an agreement. Where a married woman purchased land, taking a receipt for the purchase-money without a deed, and her husband with another built a frame house on it, a sale of the property under a mechanic's lien was held not to divest the wife's equitable title.¹ A seizure of property by the military government of the United States, without condemnation or without an act of forfeiture on the insured's part, does not divest the title where the country is unsettled.² But it has been held where there was a clause against a sale, the sale of a wreck without consent from "necessity" will avoid.³

203. But to avoid on the ground of alienation simple the whole title must be parted with; for an alienation of a part of the property, or a diminution in interest of the insured will not avoid, the retention of a legal or equitable title being a sufficient interest.⁴ Nor does a sale of a part conflict with the clause against "sale or transfer."⁵ But where there is a clause against any change in the title or possession of the property by sale or voluntary transfer, a sale of an undivided half interest was held to avoid.⁶ The clause forbidding a change of title in the property may be violated by its sale, though the insured retain an interest similar to what he previously had. Thus where a mortgagor who had sold the realty and was merely a guarantor of the mortgage debt, insured, and subsequently joined his vendee in a deed of sale, it was held to forfeit the policy under the

¹ *Pa. F. Ins. Co. v. Dougherty*, 102 Pa. St. 568. *dez v. Great West. Ins. Co.*, 3 Rob. (Ib.) 457; *Howard F. Ins. Co. v. Bruner*, 23 Pa. St. 50; *Pa. F. Ins. Co. v. Dougherty*, 102 Pa. St. 568; *Hobbs v. Memphis Ins. Co.*, 1 Sneed (Tenn.), 444; *Sides v. Knickerbocker L. Ins. Co.*, 16 Fed. R. 650 (W. D. Tenn.); *Smith v. Royal Ins. Co.*, 27 U. C. Q. B. 54; *Smith v. Provincial Ins. Co.*, 18 U. C. C. P. 223; *Burton v. Gore District Mut. Ins. Co.*, 14 U. C. Q. B. 342.

² *Keith v. Globe Ins. Co.*, 52 Ill. 518.

³ *Lewis v. Centr. Ins. Co.*, 23 Ind. 445.

⁴ *Reed v. Cole*, 3 Burr. 1513; *Hutchinson v. Wright*, 25 Beav. 444; *Stephens v. Ill. Mut. F. Ins. Co.*, 43 Ill. 327; *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. (Mass.) 249; *Tiefenthal v. Cit. Mut. F. Ins. Co.*, 53 Mich. 306; *Morrison v. Tenn. M. & F. Ins. Co.*, 18 Mo. 262; *Jecko v. St. Louis F. & M. Ins. Co.*, 7 Mo. Ap. 308; *French v. Rogers*, 16 N. H. 177; *Manley v. Ins. Co. of N. A.*, 1 Lans. (N. Y.) 20; *Ætna F. Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385; *Fernan-*

dez v. Great West. Ins. Co., 3 Rob. (Ib.) 457; *Howard F. Ins. Co. v. Bruner*, 23 Pa. St. 50; *Pa. F. Ins. Co. v. Dougherty*, 102 Pa. St. 568; *Hobbs v. Memphis Ins. Co.*, 1 Sneed (Tenn.), 444; *Sides v. Knickerbocker L. Ins. Co.*, 16 Fed. R. 650 (W. D. Tenn.); *Smith v. Royal Ins. Co.*, 27 U. C. Q. B. 54; *Smith v. Provincial Ins. Co.*, 18 U. C. C. P. 223; *Burton v. Gore District Mut. Ins. Co.*, 14 U. C. Q. B. 342. ⁵ *Blackwell v. Ins. Co.*, 48 Oh. St. 533; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507.

⁶ *McEwan v. West. Ins. Co.*, 1 Mich. N. P. 118.

above clause.¹ In *Savage v. Howard Ins. Co.*,² a distinction was taken between the sale of an interest in property and the sale of the property, and it was held a sale of an interest, as, for example, on the entrance of the insured into a co-partnership the assigning his insured property to it as firm assets, was not a forfeiture of the insurance under the clause "sale or conveyance."³ But a sale of the entire interest will of course avoid.⁴

204. Insurers usually insert in their policies various clauses against a transfer of the property, such as that the policy shall be void on a "sale," or "sale or conveyance," or on a "change of title or possession," and so forth; and such clauses may avoid a policy though the insured may still retain a sufficient insurable interest at the common law, and like any other conditions they are precedent.⁵ Where the sale is not an outright conveyance, but contains conditions subsequent, the question as to whether such an alienation comes within one of the above conditions of the policy or not, is often difficult to answer.

205. Where there was a clause against the sale of the property, and the vendor sold to a mortgagee, who was allowed to remain in possession for a year under an agreement to resell to him for a fixed sum during that period, but that if the price were not therein paid the property should fully vest absolutely in the buyer, it was held a sale which avoided the policy.⁶ A sale and an unsealed agreement by the vendee to reconvey on payment of a sum of money, was held an alienation.⁷ So where a policy was issued to the mortgagor, loss payable to the mortgagee, and after the insured's death his heirs conveyed to the mortgagee, who orally agreed to sell the estate, and, after deducting his mortgage debt, pay the proceeds to the estate of the mortgagor, the policy was avoided as the title was vested in the grantee, and the estate not charged with a trust.⁸ In

¹ *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389. 475; *Lett v. Guardian F. Ins. Co.*, 125 N. Y. 82.

² 52 N. Y. 502. See also *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389.

³ *Scanlon v. Un. F. Ins. Co.*, 4 Biss. 511 (N. D. Ill.).

⁴ *Savage v. Long Island Ins. Co.*, 43 How. Pr. (N. Y.) 462.

⁵ *Home Ins. Co. v. Bethel*, 42 Ill. Ap.

⁶ *Tatham v. Commerce Ins. Co.*, 4 Hun (N. Y.), 136. See *Grable v. German Ins. Co.*, 32 Neb. 645.

⁷ *Adams v. Rockingham Mut. F. Ins. Co.*, 29 Me. 292. See also *Foote v. Hartford F. Ins. Co.*, 119 Mass. 259.

⁸ *Dailey v. Westchester F. Ins. Co.*, 131 Mass. 173.

Moulthorp v. Farmers' F. Ins. Co.,¹ A. conveyed the insured realty to B. under an agreement that the sale should be void if the purchase-money were not paid in a specified time, or when B. should alien the property, and assign with the company's consent the policy to B., but retained possession under the agreement with B., which further stipulated that the price should be secured by well-secured notes payable at the time mentioned or when B. aliened. With the company's consent A. and B. assigned the policy to the plaintiff, and A. gave a quit-claim deed to perform the condition of the agreement. Subsequently B. aliened with the company's consent, but his alienee conveyed without it, and it was held this avoided the policy, as B. had a defeasible title.

If the legal effect of a sale is to create, in point of fact, a total alienation, the fact the parties did not think it would, or the motive of the parties in selling, is immaterial.²

A sale for taxes in Lower Canada, not absolutely divesting the title till the time to redeem has past, has been held not an alienation that will avoid.³ And a policy to A. on realty subsequently sold for taxes to B., who at once transferred it to A.'s wife, and she to C., A. joining, and then C. to A., was held not to avoid.⁴ But if the policy issue to the owner of an equity of redemption, the alienation clause operates when the time to redeem expires; and, therefore, as the alienation clause cut off his interest at the expiration of the equity, an agreement to convey on payment of the debt, without consideration, which could not be enforced, would not prevent the alienation clause from applying.⁵

206. Where the terms of the sale contain a condition that must be performed before the title vests in the vendee, it is not necessarily an alienation that will avoid; as where two deeds are executed simultaneously and constitute the same transaction, and one contains a condition precedent to the title vesting, the sale is not an alienation within a clause against alienation. Thus, where A. conveys to B. with a warranty deed, and B. dedeed him back the title, conditioned that unless B. should pay A. a specified

¹ 52 Vt. 123.

⁴ *Kyte v. Commer. Un. Assur. Co.*,

² *Langdon v. Minn. Farmers' Mut. F. Ins. Co.*, 22 Minn. 193.

144 Mass. 43

⁵ *Essex Sav. Bk. v. Meriden F. Ins.*

³ *Paquet v. Cit. Ins. Co.*, 4 Quebec Co., 57 Conn. 335.
L. R. 230.

sum in three years, which was optional, and allowing A. to remain in possession in the mean time, the second deed should be void;¹ the policy was held valid. So where a mortgagor of a vessel sells his remaining interest, under a stipulation to pay off the mortgage, and failing to comply the sale falls and the title is reconveyed to him, a policy issued to him before the agreement of sale will cover a loss after the reconveyance.² And where a vendor verbally agreed to assign a policy to his vendee on a contract of sale with a purchase-money mortgage, it was held, on a loss before completion of the terms of the sale, the vendor could recover, because till delivery of the policy the contract was unfulfilled, and after completion of the sale the vendee could set up the failure to deliver the policy and get a rebate for the destruction of the house.³ But in *Farmers' Ins. Co. v. Archer*,⁴ where there was a sale, and as part consideration for the price a bond acknowledged under the Deeds Act, covenanting to permit the insured to occupy the dwelling during his life, it was held a change of title.⁵

If a sale is never carried out, or the property is reconveyed and the bargain thrown up, and the vendor in possession at the loss, the policy has been held not avoided;⁶ though apparently the contrary was held in *Davidson v. Hawkeye Ins. Co.*,⁷ but no cases were cited by the Court in support of their position, and one of the Judges dissented. Where a loss occurs after realty has been offered for sale by order of a Court, which needs some further proceeding as a judicial confirmation, and the loss occurs before that has taken place, the sale clause in a policy is not violated.⁸ So where a loss to property, covered by insurance in favor of a mortgagor, occurs after such confirmation and after the sale is set aside, though before the order is vacated, the insurable interest of the mortgagor

¹ *Titemore v. Vt. Mut. F. Ins. Co.*,
20 Vt. 546.

² *Worthington v. Bearse*, 12 Allen
(Mass.), 354.

³ *F. & M. Ins. Co. v. Morrison*, 11
Leigh (Va.), 354.

⁴ 36 Oh. St. 608.

⁵ See also *Smith v. Phoenix Ins. Co.*,
91 Cal. 323; *F. Ass'n v. Flourney*, 19
S. W. 893 (Tex.).

⁶ *Power v. Ocean Ins. Co.*, 19 La.
28. See also *Oakman v. Dorchester*
Mut. F. Ins. Co., 98 Mass. 57.

⁷ 71 Iowa, 532.

⁸ *Browning v. Home Ins. Co.*, 71 N.
Y. 508; *Haight v. Continental Ins. Co.*,
92 Ib. 51; *Farmers' Mut. Ins. Co. v.*
Graybill, 74 Pa. St. 17; *Bull v. N. Brit.*
Can. Invest., Etc., Co., 14 Ont. R.
322.

in possession is not divested by such unauthorized sale and confirmation.¹ It has been held that an executory agreement of sale is not a sale within the policy clause;² though part of the purchase-money is paid.³ Nor is such a sale "a change of title."⁴ Nor is a lease for five years, with an option to buy at the end of it, and possession in the lessee, a sale.⁵ But in one of the lower Courts in New York a contract under seal to sell with payment of part of the price was held a change of interest.⁶

207. A contract that cannot be enforced has been held not a sale. As a parol contract of sale not to bind for two years,⁷ or a sale of personalty where there is no transfer of interest under the Statute of Frauds.⁸ But a conveyance by a father and mother to a daughter, without a consideration, but in which a consideration was inserted before recording the deed, and a note executed by the daughter to her mother, who immediately handed it back, which the insured when informed of did not object to, was held an avoidance.⁹ A school district has still an interest in a school house after its sale, by a vote of the district, for credit instead of cash, which was not ratified, the sale being by law void unless thereafter ratified.¹⁰ A sale of the wife's insured realty by her husband does not avoid, she being ignorant of it.¹¹ A voidable sale by a trustee, afterwards set aside, has been held not to be a total alienation within conditions in a policy to the effect that, "if property be sold or transferred or any change in title or possession," or "if property has been sold or delivered or otherwise disposed of so that all interest or liability

¹ *Richland Co. Mut. Ins. Co. v. Sampson*, 38 Oh. 672.

² *Perry Company Ins. Co. v. Stewart*, 19 Pa. St. 45; *Terpenning v. Agricult. Ins. Co.*, 14 Hun (N. Y.), 299; *Kemp-ton v. State Ins. Co.*, 62 Iowa, 83.

³ *Wash. F. Ins. Co. v. Kelly*, 32 Md. 421; *Boston, Etc., Ice Co. v. Royal Ins. Co.*, 12 Allen (Mass.), 381; *Shotwell v. Jefferson Ins. Co.*, 5 Bos. (N. Y.) 247; *Masters v. Madison Co. Mut. Ins. Co.*, 11 Barb. (N. Y.) 624; *Trumbull v. Portage Co. Mut. Ins. Co.*, 12 Oh. 305; *Hill v. Cumberland Val. Mut. Protec. Co.*, 59 Pa. St. 474.

⁴ *Bull v. North. Brit. Can., Etc., Co.*, 15 Ont. Ap. 421.

⁵ *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236.

⁶ *Germond v. Home Ins. Co.*, 2 Hun (N. Y.), 540.

⁷ *Somerset Co. Mut. Ins. Co. v. Lep-ley*, 3 Luz. Leg. Obs. 52 (Pa.).

⁸ *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y. 6.

⁹ *Baldwin v. Phoenix Ins. Co.*, 10 Ins. L. J. 32 (N. H.).

¹⁰ *School District v. Ætina Ins. Co.*, 62 Me. 330.

¹¹ *Commer. Ins. Co. v. Spankneble*, 52 Ill. 53.

on the part of the insured has ceased," the policy shall be forfeited; the two clauses together being held to mean that to avoid the alienation must be a total cessation of interest.¹ It has been held, where the insured assigned a policy on property to A. as security, and then conveyed the insured property to B., though the conveyance to B. may be void against A., who was a creditor of the insured, yet as the insured cannot impeach his own deed the policy was void.² An alienation which is void against creditors has also been held to be within the clause against sale, transfer, or change of title.³

208. It has been held in California, where the policy contained a clause against sale, that after a sale on credit the vendor's lien for the purchase-money was not sufficient to keep alive the policy.⁴ In *Bishop v. Clay F. & M. Ins. Co.*,⁵ the trustees in possession under a second mortgage of a railroad company, insured a station, &c., as "trustees of convertible mortgage," "as their frame depot," and the policy had a clause against sole change of title, &c. A foreclosure was had under the first mortgage and the trustees advanced \$83,000 on the road, which was sold to a new corporation; and the Court, in the foreclosure decree, provided for a lien in favor of the second mortgage to be discharged from the first earnings of the road. On a loss the second mortgage trustees claimed a first lien on the whole road, but it was held the foreclosure sale to the new company was a termination of the insurance, the lien interest was not the same interest as that insured, and parol evidence was not admissible to show that it was so intended. It has been held in Missouri that a sale and a mortgage back to secure the price does not avoid a policy.⁶ But under a clause against an alienation by sale, or otherwise, a sale and purchase-money mortgage was held to avoid.⁷ Where there is a proviso against a sale or change of title a sale and mortgage for the price will avoid.⁸ And a mortgage

¹ *Commer. Un. Assur. Co. v. Scammon*, 126 Ill. 355.

⁵ 45 Conn. 430.

² *Birdsey v. City F. Ins. Co.*, 26 Conn. 165.

⁶ *Morrison v. Tenn. M. & F. Ins. Co.*, 18 Mo. 262.

³ See *Orrell v. Hampden F. Ins. Co.*, 13 Gray (Mass.), 431; *Manfg. Co. v. Worcester Mut. F. Ins. Co.*, 11 Met. (Mass.) 429; *Baldwin v. Phoenix Ins. Co.*, 10 Ins. L. J. 32 (N. H.).

⁷ *Tittmore v. Vt. Mut. F. Ins. Co.*, 20 Vt. 546.

⁴ *Cal. State Bk. v. Hamburg-Bremen Ins. Co.*, 71 Cal. 11.

⁸ *Home Mut. F. Ins. Co. v. Hauslein*, 60 Ill. 521; *Savage v. Howard Ins. Co.*, 52 N. Y. 502. Though see *Kitta v. Massasoit Ins. Co.*, 56 Barb. (N. Y.) 177.

coupled with a power of sale has been held a change of title.¹ Though in Ohio a sale and mortgage to secure the price was held not to be "a transfer or change of title."² The clause, "the interest of the assured . . . in the property insured is not assignable unless by consent . . . and in case of the transfer or termination of any such interest . . . by sale or otherwise . . . this policy" shall be void, was held not to avoid where there was a conveyance of a vessel accompanied by a reconveyance by way of mortgage.³ But where a husband and wife conveyed a life estate which she had in one-third of a lot, and tenancy for years in the rest, on which her husband had erected a house, to the reversioner, on the latter agreeing to make her an annual payment during life, together with the insured's conveyance of the two-thirds to the same person, who gave a mortgage on the whole to secure the annual sums, the mortgagor entering into possession, it was held on a loss before anything was paid, that there was an alienation under the clause against alienations in "whole or in part."⁴ Where the clause forfeited "if the property be sold," and the insured conveyed and took a mortgage therein for part of the price, and assigned the policy with consent of the grantee, who endorsed it payable to the grantor as interest may appear, which the insurer likewise assented to, a subsequent conveyance by the grantee unassented to was held to avoid.⁵

209. Where there is no clause, it has been held a sale, and that a judgment given by the vendee for the price avoid, as this is only a general lien and differs from a mortgage.⁶ Where the alienee of a moiety of the premises gave back a lease with an agreement to repair it is within a clause against alienation; it is not a conveyance *in futuro*.⁷

210. A sale after a conveyance in trust for creditors obviously avoids.⁸ And where, as part of the consideration for an assignment in trust for creditors, the creditors release the debts, the assignor no

¹ *Sossaman v. Pamlico Banking & Ins. Co.*, 78 N. C. 195.

² *Smith v. Un. Ins. Co.*, 120 Mass. 90.

³ *Grevenmeyer v. South. Mut. F. Ins. Co.*, 62 Pa. St. 340.

⁴ *Bates v. Commer. Ins. Co.*, 4 Ins. L. J. 716 (Oh.).

⁵ *Boynton v. Clinton, Etc., Mut. Ins. Co.*, 16 Barb. (N. Y.) 254.

⁶ *Hitchcock v. Northw. Ins. Co.*, 26 N. Y. 68.

⁷ *Dadmun Mfg. Co. v. Worcester*

⁸ *Abbott v. Hampden Mut. F. Ins. Co.*, 30 Me. 414.

Mut. F. Ins. Co., 11 Met. (Mass.) 429.

longer has interest.¹ And if, in such a case, the creditors agree to pay the surplus, if any, to the assignor, it was held the mere possibility of a balance, in the absence of any evidence to show there was an expectation of such, would not be sufficient to give the assignor an insurable interest.² An assignment to an assignee for the benefit of creditors was held to avoid under a clause against alienation;³ or under a clause against an assignment of interest.⁴ And a clause against any alienation of the property is violated by the insolvent proceedings of Massachusetts.⁵ But a deed conveying goods in trust to pay creditors when the insured retains the actual possession of the goods, and the assignee only gets a technical title, was held not within a clause against sale or transfer.⁶ In *Appleton Iron Co. v. British Amer. Assur. Co.*,⁷ the policy was payable to a mortgagee of chattels by the mortgagor, who subsequently assigned in insolvency, and it was held this did not avoid; since, by the law of Wisconsin, the chattel mortgage vested absolutely in the mortgagee; therefore, there was no transfer of title or possession of the body of the property within the clause; nor did the policy pass, as it was here substantially pledged with the goods, and the payee stood substantially in the same position as the assignee.

211. It was held apparently in *Re Carow*⁸ that an adjudication in bankruptcy causes a cessation of interest. A decree in bankruptcy is within a clause against alienation.⁹ And an assignment in bankruptcy is within a clause as to a sale or transfer or change of title.¹⁰ It is not material whether the bankruptcy proceed on the voluntary petition of the insured or not,¹¹ though in Pennsylvania an assignment in bankruptcy has been held not to fall within a clause against a sale, conveyance, or assignment.¹²

¹ *Lazarus v. Commw. Ins. Co.*, 5 Pick. (Mass.) 76.

² *Ib.*

³ *Little v. Eureka Ins. Co.*, 4 Amer. L. Rec. 228 (Oh.).

⁴ *Dey v. Poughkeepsie Mut. Ins. Co.*, 23 Barb. (N. Y.) 623.

⁵ *Young v. Eagle F. Ins. Co.*, 14 Gray (Mass.), 150.

⁶ *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9.

⁷ 46 Wis. 23.

⁸ 4 N. Bank Reg. 178 (S. D. N. Y.).

⁹ *Adams v. Rockingham Mut. F. Ins. Co.*, 29 Me. 292.

¹⁰ *Starkweather v. Cleveland Ins. Co.*, 15 Int. Rev. Rec. 59 (S. D. Oh.); *Perry v. Lorrillard F. Ins. Co.*, 6 Lans. (N. Y.) 201.

¹¹ *Adams v. Rockingham Mut. Ins. Co.*, 29 Me. 292; *Starkweather v. Cleveland Ins. Co.*, 15 Int. Rev. Rec. 59 (S. D. Oh.).

¹² *Fayette Mut. F. Ins. Co. v. Neel*, 6 W. N. C. (Pa.) 233.

212. The devolution of the property from an intestate has been held not to work an alienation, but that the heirs will retain an interest on a policy to one, his executors, assigns, etc.¹ It has also been held that the devolution by death from an intestate is not within a clause against alienation by sale or otherwise, or alienation or transfer.² In Virginia it was also held a descent to the heirs was not void under the clause against a change or transfer of the property.³ But it has been held in New York that a clause against a change of title or possession avoids in the event of death and intestacy, as the words change of title are stronger than sale or alien, and include all changes of title.⁴ Nor is the presence of the words heirs, etc., after the name of the insured material, in the face of an express stipulation against exchange of title.⁵ Where there is a devise of realty the clause against change of title or perhaps the clause against alienation would avoid.⁶ It has also been held that the title the executor takes in the personalty of his deceased testator is "a change of title by operation of law."⁷

213. As a rule, the clauses against sales or alienations by the insured have been held to mean sales in a popular sense and not mortgages; that is, to mean a complete parting with the property. Thus the clause against "alienations" is not broken by a mortgage.⁸ Nor does a mortgage of personalty, without a transfer of possession, violate the clause.⁹ Nor is a chattel mortgage an

¹ Wyman v. Wyman, 26 N. Y. 253; Columbia Ins. Co. v. Mullin, 4 Leg. Opin. (Pa.) 572.

² Pfister v. Gerwig, 122 Ind. 567; Burbank v. Rockingham Mut. F. Ins. Co., 24 N. H. 550; Wyman v. Wyman, 26 N. Y. 253; Farmers' Mut. Ins. Co. v. Graybill, 74 Pa. St. 17; Columbia Ins. Co. v. Mullin, *supra*.

³ Ga. Home Ins. Co. v. Kinnier, 28 Grat. (Va.) 88.

⁴ Lappin v. Charter Oak F. & M. Ins. Co., 58 Barb. (N. Y.) 325; Hine v. Woolworth, 93 N. Y. 75; in the last case the words were change of title in any manner, whether by act of the parties or operation of law.

⁵ Hine v. Woolworth Co., 93 N. Y. 75.

⁶ Sherwood v. Agric. Ins. Co., 73 N. Y. 447; Burbank v. Rockingham Mut. F. Ins. Co., 24 N. H. 550; Columbia Ins. Co. v. Mullin, 4 Leg. Opin. (Pa.) 572.

⁷ Sherwood v. Agric. Ins. Co., 73 N. Y. 447. It may be remarked that assurances under the Customs Annuity and Benevolent Fund, Att'y Gen'l v. Abdy, 1 H. & C. 266, are not part of the insured's estate, as the appointment is limited, and no legacy duty is payable; Att'y Gen'l v. Rowsel; Tilsley on Stamps, 685 (2d ed.); but a succession duty is payable: Att'y Gen'l v. Abdy, 1 H. & C. 266.

⁸ Rollins v. Columbian Mut. F. Ins. Co., 25 N. H. 200.

⁹ Rice v. Tower, 1 Gray (Mass.), 426.

"assignment" of the property.¹ The clause against "sale or conveyance" is not violated by a mortgage;² nor is the clause against "sale or transfer" by a mortgage or foreclosure, if a right to redeem is left.³ The clause against "sale, transfer, or conveyance" is not broken by a mortgage.⁴ Nor is the creation of a chattel mortgage within a provision against sale, alienation, or transfer, as there is not absolute transfer when the right of possession and possession are kept by the owner.⁵ The clause against alienation "by sale or otherwise" is not violated by a mortgage,⁶ unless where the equity of redemption is also conveyed.⁷ Nor does a mortgage violate the clause against "termination of interest by sale or otherwise."⁸ But a quit-claim deed of all one's interest to the mortgagee avoids under a condition against alienation by sale or otherwise.⁹ A mortgage does not avoid under a clause against transfer or termination of interest by sale;¹⁰ nor is the clause against the property being "sold or conveyed in whole or in part" violated by a sale in execution, if the equity remains.¹¹ It has been held that a mortgage is a material alteration in ownership of the property, under a clause against all "alterations in any material way in the ownership, situation, or state of the property insured."¹² A mortgage will not avoid in Canada under a clause against alienation in a policy issued by a stock company.¹³ But apparently the crea-

¹ *Sovereign F. Ins. Co. v. Peters*, 12 Duv. (Can.) 33. *Conover v. Mut. Ins. Co.*, 3 Den. (N. Y.) 254.

² *Hart. F. Ins. Co. v. Walsh*, 54 Ill. 164. ⁷ *Lawrence v. Holyoke Ins. Co.*, 11 Allen (Mass.), 387.

³ *Aurora F. & M. Ins. Co. v. Hopkins Mfg. Co.*, 11 Ins. L. J. 341 (Mich.); see also *Va. F. & M. Ins. Co. v. Feagin*, 62 Ga. 515; *Bryan v. Traders' Ins. Co.*, 145 Mass. 389; *Montreal Assur. Co. v. McGillivray*, 2 L. Can. J. 221; *Parsons v. Queen Ins. Co.*, 29 U. C. C. P. 188.

⁴ *Aurora F. Ins. Co. v. Eddy*, 55 Ill. 213; *Friezen v. Allemania Ins. Co.*, 30 Fed. R. 352 (W. D. Wis.). ⁸ *Holbrook v. Amer. Ins. Co.* 1 Curt. 193 (D. R. I.).

⁵ *Van Deusen v. Charter Oak F. & M. Ins. Co.*, 1 Rob. (N. Y.) 55. ⁹ *Hoxsie v. Providence Mut. F. Ins. Co.*, 6 R. I. 517.

⁶ *Cowen v. Iowa State Ins. Co.*, 40 Iowa, 551; *Pollard v. Somerset Mut. F. Ins. Co.*, 42 Me. 221; *Folsom v. Belknap Co. Mut. F. Ins. Co.*, 30 N. H. 231; ¹⁰ *Jecko v. St. Louis F. & M. Ins. Co.*, 7 Mo. Ap. 308.

⁷ *Strong v. Mfrs. Ins. Co.*, 10 Pick. (Mass.) 40. See *Smith v. Monmouth Mut. F. Ins. Co.*, 50 Me. 96.

⁸ *Edmonds v. Mut. Safety F. Ins. Co.*, 1 Allen (Mass.), 311. ¹² *Sands v. Standard Ins. Co.*, 27 U. C. Ch. 167; *Bull v. North Brit. Can. Invest. Co., Etc.*, 14 Ont. R. 322; *Kelly v. Liv. & Lond. & Globe Ins. Co.*, 2 Han. (N. B.) 266.

tion of a mortgage will cause a forfeiture of a policy of a mutual company, on the ground that the premium is by the statute made a lien on the property, and a mortgage would introduce complications which it was reasonable to suppose the clauses against alienation contemplated.¹ And this has been held even where the premium in a mutual company was cash, as the notes were still bound for the payment of the cash policies.² It has been held a mortgage does not violate the clause against any "change of title."³ And in a lower Court in New York a chattel mortgage has been held not to be "a change of title."⁴ A chattel mortgage does not avoid under the clause against "sale or transfer or change of title or possession by legal process and judicial decree or voluntary transfer or conveyance," as the change must be complete.⁵ But in Canada a mortgage was held to be within the clause against "change of interest by operation of law or act of the parties."⁶ A mortgage under which no possession had been taken by the mortgagee and where the debt was not due, will not avoid a policy under a clause of forfeiture, if the property be "sold or transferred, or upon passing or entry of decree of foreclosure, or upon sale under deed of trust, if any change takes place in title or possession by legal process or judicial decree or voluntary transfer."⁷ And so the clause against "change of title or possession in the property by sale, legal process, judicial decree, or voluntary conveyance" has been held not to be avoided by a mortgage,⁸ even where there has been a foreclosure, but the equity to redeem had not been lost.⁹ But in Wisconsin the creation of a

¹ *Burton v. Gore Dist. Mut. F. Ins. Co.*, 14 U. C. Q. B. 342; *Kanady v. Gore Dist. Mut. F. Ins. Co.*, 44 Ib. 261; *Sands v. Standard Ins. Co.*, 27 U. C. Ch. 167.

² *Kanady v. Gore Dist. Mut. F. Ins. Co.*, 44 U. C. Q. B. 261.

³ *Bull v. N. Brit. Can., Etc., Co.*, 15 Ont. Ap. 421. See also *Buck v. Phoenix Ins. Co.*, 76 Me. 586; but see *Semmelhaak v. Can. F. & M. Ins. Co.*, 4 L. N. (Can.) 205, to the contrary.

⁴ *Dresser v. United Firemen's Ins. Co.*, 45 Hun (N. Y.), 298.

⁵ *Hennessey v. Manhat. F. Ins. Co.*, 28 Ib. 98.

⁶ *O'Neil v. Ottawa Agric. Ins. Co.*, 15 Can. L. J. 207.

⁷ *Judge v. Conn. F. Ins. Co.*, 132 Mass. 521.

⁸ *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 164; *Aurora F. Ins. Co. v. Eddy*, 55 Ib. 213; *Commer. Ins. Co. v. Spankneble*, 52 Ib. 53; *Byers v. Farmers' Ins. Co.*, 35 Oh. St. 606. In this last case the phrase was substantially the same.

⁹ *Loy v. Home Ins. Co.*, 24 Minn. 315.

chattel mortgage was held to violate the clause against a "change of title."¹

In Georgia the statute provides, "an alienation of property insured and a transfer of the policy without the consent of the insurer avoid the insurance, but the hypothecation or creation of a lien does not." It was held in the Federal Courts in Georgia a deed to a creditor to secure a debt, with a reservation of the balance, is not within a clause against "sale, transfer, or exchange in title or possession."² In West Virginia the execution of a trust deed to secure debts on the property under which no sale was had, is not within a clause against "transfer or change of title, or the foreclosure of a mortgage."³

A policy to one receiver, to be void if a change in title or possession (except on succession by death) "whether by legal process, or judicial decree, or voluntary transfer or conveyance," was held not avoided by the appointment of another receiver; for it was said the property is legally not in his possession, but in the Courts, and the title is in the parties for whom he holds it.⁴

214. It has been usually held that a conveyance which is absolute on its face may be shown to be a mortgage.⁵ In Maine, by the R. S. 1840, c. 125, sec. 1, an absolute conveyance "with a separate instrument of defeasance of the same date, and executed at the same time, shall constitute a mortgage;" but it was held a deed purporting to be absolute, though intended to be defeasible by bond, will not be defeated unless the bond be registered.⁶ In New York, when such a deed has been delivered, it has been held not to avoid a policy under the clause against a "sale, transfer of the property,

¹ *Schumitsch v. Amer. Ins. Co.*, 48 Wis. 26. ⁴ *Seld. (N. Y.)* 416; *Barry v. Hamburg-Bremen F. Ins. Co.*, 110 N. Y. 1; *Cole*

² *Nussbaum v. North Ins. Co.*, 37 Fed. R. 524 (S. D. Ga.). *v. Bolard*, 22 Pa. St. 431; *Russell v. Southard*, 12 How. 139; *Holbrook v. Amer. Ins. Co.*, 1 Curt. 193 (D. R. J.);

³ *Nease v. Ins. Co.*, 32 W. Va. 283. *Ottawa Agric. Ins. Co. v. Sheridan*, 5 U. S. 287. *Duv. (Can.)* 157; *Kelly v. Liv. & Lond. & Globe Ins. Co.*, 2 Han. (N. B.) 266.

⁵ *Hutchinson v. Wright*, 25 Beav. 444; *Gardner v. Cazenove*, 1 H. & N. 423; *Ward v. Beck*, 1 C. B. N. S. 668; *Nat. Ins. Co. v. Webster*, 83 Ill. 470; *Venderhaise v. Hughes*, 2 Beas. (N. J.) 410; *Hodges v. Tenn. M. & F. Ins. Co.*, ⁶ *Tomlinson v. Monmouth Mut. F. Ins. Co.*, 47 Me. 232; *Smith v. Monmouth Mut. F. Ins. Co.*, 50 Me. 96. See R. S. 1840, c. 97, sec. 27, as to registration.

or change in the title."¹ But in Michigan an absolute sale, though for collateral, is a change of title.²

215. The creation of a mortgage does not avoid under the clause against alienation by "sale, mortgage, or otherwise," as alienation by mortgage probably means a foreclosure.³ Nor will the mere commencement of foreclosure proceedings avoid under the words "change of ownership or increase of hazard."⁴ The constructive possession in goods by the sheriff under a levy, where the insured retains actual possession, does not vitiate the policy under a clause against sale or transfer.⁵ So it has been held a seizure on execution without removal of the personalty is not an alienation.⁶ And in Louisiana the clause against "change of command" was held not to be violated by a seizure of the vessel and its custody by the sheriff.⁷ It has been held an alienation to a mortgagee is within the clause against "termination of interest by sale or otherwise."⁸ A foreclosure was held not to avoid a policy to a mortgagor, loss payable to the mortgagee under the clause against an alienation.⁹ And where the mortgagor of chattels insured, and the insurer permitted the transfer of the mortgage, it was held not to avoid the policy as an alienation.¹⁰ In Michigan a policy to the mortgagee was held not forfeited by a foreclosure of the mortgage, where the equity of redemption had not expired, where there was a clause against a sale or transfer.¹¹ Where the policy is issued to the mortgagee the clause against "change of title" is not broken by a mortgagee becoming owner.¹² And where the mortgagee is payee of a policy to the mortgagor in a mutual company, and also agrees to pay the note, an involuntary foreclosure is not an alienation, for

¹ *Barry v. Hamburg-Bremen F. Ins. Co.*, 110 N. Y. 1; reversing same case in 21 J. & S. (N. Y.) 249.

² *West. Mass. Ins. Co. v. Riker*, 10 Mich. 279.

³ *Shepherd v. Un. Mut. F. Ins. Co.*, 38 N. H. 232.

⁴ *Phoenix Ins. Co. v. Un. Mut. L. Ins. Co.*, 101 Ind. 392.

⁵ *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9.

⁶ *Rice v. Tower*, 1 Gray (Mass.), 426.

⁷ *Marigny v. Home Mut. Ins. Co.*, 13 La. An. 338.

⁸ *Bilson v. Manfg. Ins. Co.*, 7 Am. L. Reg. 661 O. S. 4 (D. Pa.).

⁹ *Dix v. Mercan. Ins. Co.*, 22 Ill. 272.

¹⁰ *Wash. Ins. Co. v. Hayes*, 17 Oh. St. 432.

¹¹ *Hopkins Manfg. Co. v. Aurora F. & M. Ins. Co.*, 48 Mich. 148.

¹² *Esch v. Home Ins. Co.*, 78 Iowa, 334.

though the mortgagee was not a member of the company, the insurance was with both.¹ There will be no avoidance of the policy where a mortgage of the insured property is not completely executed.²

216. A parol lease is not an alienation.³ And *semble* a demise for a year of the building insured is not an alienation within the Canada Act.⁴ And in Pennsylvania a clause against "change of title" was held not violated by a lease.⁵ But a lease has been held within a clause against a "change in possession."⁶ And where the owner had made an oral executory lease, but allowed the intended lessee to enter under a parol license to repair, it was held not to avoid, as a change of possession.⁷ It has been held a colorable lease made to constitute one a warehouseman upon whose receipts the goods insured would be dealt with, does not avoid a policy, as a change of occupation or control on goods insured as "own, and held in trust."⁸

In *Girard F. & M. Ins. Co. v. Hebard*,⁹ the word "property" in a clause to the effect, that "if the property be sold or transferred, or any change takes place in the title or possession . . . by voluntary transfer or conveyance . . . or if the interest be not truly stated," was held to apply to both real and personalty on the reading of the whole clause, and to cover the subject-matter, which was lumber.

217. It is not necessary for the insured to notify the insurer of an incumbrance subsequent to the issue of the policy, unless specially required.¹⁰ But if required in the policy, a failure to do so will of course avoid. Nor would the knowledge on the part of the insured of the entry of the incumbrance be a material fact.¹¹ Where there is a warranty to notify the insurer of future incumbrances, those occurring between the application and the policy would be

¹ *Bragg v. New Eng. Mut. F. Ins. Co.*, 25 N. H. 289. Cal. 438. See also *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289.

² *Olmstead v. Iowa Mut. Ins. Co.*, 24 Iowa, 503; *New Orleans Ins. Co. v. Gordon*, 68 Tex. 144. ⁷ *Alkan v. N. H. Ins. Co.*, 53 Wis. 136.

³ *Lancashire Ins. Co. v. Chapman*,

⁴ *Lane v. Me. Mut. F. Ins. Co.*, 12 Me. 44. ⁸ *Rev. Leg. (Can.)* 47.

⁵ *Hobson v. W. D. M. Dist. F. Ins. Co.*, 6 U. C. Q. B. 536. ⁹ 95 Pa. St. 45.

⁶ *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289. ¹⁰ *Richmond, Etc., F. Ins. Co. v. Fee*, 14 Quebec L. R. 293.

⁷ *Wenzel v. Commer. Ins. Co.*, 67 Ins. Co., 15 W. N. C. (Pa.) 43. ¹¹ *Pa. Mut. F. Ins. Co. v. Schmidt*, 119 Pa. St. 449; *Hill v. Pa. Mut. F. Ins. Co.*, 15 W. N. C. (Pa.) 43.

within the clause.¹ A chattel mortgage which only embraces part of the subject-matter of the insurance, as a mortgage on four cows, has been held to forfeit a policy which covers more.² If the policy issues on the statement of the insured that the property will be encumbered to a specific amount, an incumbrance created to a greater amount will avoid under a clause against an increase of incumbrances.³ But where the insured stated he had liens exceeding a gross amount, and some were paid, but he did not know how many, it was held a revival of an old or entry of a new judgment did not avoid, if there was no increase in the totality of incumbrances, as the insured might have meant to refer to some he thought would be entered.⁴ Where there was a clause against incumbrances, and the wife had insured a creamery erected on her husband's land, and both executed a mortgage thereon without reserving the creamery, it was held a forfeiture.⁵ Where A. insured a house standing on land devised to his wife, and there was no proof under the Married Woman's Act as to its application, it was held a mortgage in fee by the husband avoided; for, unless the act applied the conveyance avoided, as, *prima facie*, the husband would be taken to have the right to execute the mortgage.⁶ The paying off an old mortgage does not authorize the taking of a new one, under the incumbrance clause.⁷ But where there was a statement of incumbrances, not specific, it was held that liens up to the amount stated would not avoid under a clause against liens.⁸ Where there is insurance on a building on a farm incumbered at the issue of the policy, and part of the farm was sold and the incumbrance reduced, but was proportionately greater on the whole than at the issue of the policy, it violates a clause against incumbrances.⁹ But it has been held that the placing of a mortgage on a tract of land other than that tract on which the insured house stands will not avoid, though the house

¹ Pa. Ins. Co. v. Gottsman, 48 Pa. St. 151.

² Dacey v. Agricult. Ins. Co., 21 Hun (N. Y.), 83.

³ Sentell v. Oswego Co. Farmers' Ins. Co., 16 Ib. 516.

⁴ Kister v. Lebanon Mut. Ins. Co., 128 Pa. St. 553.

⁵ Mallory v. Farmers' Ins. Co., 65 Iowa, 450.

⁶ Russ v. Mut. F. Ins. Co., 29 U. C. Q. B. 73.

⁷ Hankins v. Rockford Ins. Co., 70 Wis. 1.

⁸ Gould v. Dwelling-House Ins. Co., 134 Pa. St. 570.

⁹ Russell v. Cedar Rapids Ins. Co., 78 Iowa, 216.

was described as on an aggregate number of acres.¹ Where there is a clause against future incumbrances, the presumption is that a mortgage which appears duly recorded is not yet paid.² A void mortgage, as one on a homestead, in Michigan, not signed by the wife, does not avoid.³ Where a sublessee has insured, the lessee cannot incumber the former's property by a mortgage so as to deprive him of his interest, so long as the sublessee fulfils the terms of the sublease.⁴ It has been held that the assent of the insurer to a sale does not imply an assent to the execution of a mortgage for the price, as notice of the one by no means implies notice of the other.⁵

218. A judgment is an incumbrance "to reduce interest," though it does not affect the title.⁶ An entry of a judgment avoids under a clause against "suffering a judgment to be a lien."⁷ And the confession of a judgment for an amount in excess of the value of the property is an incumbrance within the meaning of the proviso that should "an incumbrance fall . . . upon the property insured sufficient to reduce the real interest of the insured in the same to a sum equal to or below the amount insured . . . the policy shall be void."⁸

219. The seizure of the equity of redemption and its sale is an incumbrance, till a redemption or the sale is perfected by the proper lapse of time, and within the clause against incumbrances.⁹ As has been stated, a foreclosure sale, as long as the right to redeem continues, does not prevent a recovery by the insured, in the absence of a clause against it.¹⁰ But frequently policies contain clauses against foreclosure, which then avoid if broken;¹¹ and sometimes there is even a clause that commencement of foreclosure proceed-

¹ *Phoenix Ins. Co. v. Hart*, 39 Sm. (Ill.) 517.

² *Gould v. Holland Purchase Ins. Co.*, 16 Hun (N.Y.), 538.

³ *Watertown F. Ins. Co. v. Grover, Etc., Co.*, 41 Mich. 131.

⁴ *Geo. Home Ins. Co. v. Jones*, 49 Miss. 80.

⁵ *German-Amer. Bk. v. Agricult. Ins. Co.*, 8 Mo. Ap. 401.

⁶ *Brown v. Commw. Mut. Ins. Co.*, 41 Pa. St. 187.

⁷ *Egan v. Mut. Ins. Co.*, 5 Den. (N. Y.) 326.

⁸ *Kensington Nat. Bank v. Yerkes*, 86 Pa. St. 227; *Hench v. Agricult. Ins. Co.*, 122 Pa. St. 128.

⁹ *Campbell v. Hamilton Mut. F. Ins. Co.*, 51 Me. 69.

¹⁰ *Stephens v. Illinois Mut. Ins. Co.*, 43 Ill. 327.

¹¹ *Commer. Un. Assur. Co. v. Scammon*, 102 Ill. 46; *Quinlan v. Providence Wash. Acc. Ass'n*, 133 N. Y. 356.

ings shall avoid.¹ It was held in Michigan that the clause for forfeiture, on commencement of foreclosure proceedings, is not avoided by the mere advertisement, but the words must be confined to an actual offer for sale, particularly when the insurance was on an overdue mortgage interest.² But a policy to a mortgagor, with a clause against change of title, and that an entry of a foreclosure of a mortgage should be a change and alienation, was held avoided by an act on the part of the mortgagee, which, without further formality, deprives the mortgagor of title, as giving and recording under the Massachusetts Gen. Sts., c. 151, secs. 6 and 7, notice of an intention to foreclose for breach of a condition of the mortgage, where no other formality was required than this entry.³

220. Placing a bailiff in charge of a manufactory, but permitting it to run, is not "a change of title, or possession by judicial decree or legal process," as nothing is disturbed by the sheriff in the manufactory.⁴ It has been held in Minnesota that a foreclosure sale by advertisement is not a "legal process" or a "judicial decree," as it is carried on wholly outside the Court, and no change in the title effected till the time for the equity of redemption is passed; it is therefore not within the clause against "sale, transfer, voluntary conveyance, or change of title, by legal process or judicial decree."⁵ And in Wisconsin an execution sale of realty, where the insured had fifteen months to redeem in, and the purchaser cannot acquire title or possession before that time, does not avoid under the clause as to "a change of title or sale by legal process, judicial decree, or voluntary conveyance."⁶ In New Jersey a decree in foreclosure in equity without more, is not alienation.⁷ Nor is it where no deed has been made, and the sale is thrown up.⁸ The clause against "Change of title . . . and that the entry of the foreclosure of a mortgage . . . shall be deemed an alienation," is not violated by a chattel mortgage where the owner had possession;

¹ *Meadows v. Hawkeye Ins. Co.*, 62 Iowa, 387.

² *Mich. State Ins. Co. v. Lewis*, 30 Mich. 41.

³ *McIntire v. Norwick F. Ins. Co.*, 102 Mass. 230. See also *Hidden v. Slater, Mut. F. Ins. Co.*, 2 Cliff. 266 (D. R. I.).

⁴ *West. Assur. Co. v. Laver*, 14 Ins. L. J. 552 (Ky.).

⁵ *Loy v. Home Ins. Co.*, 24 Minn. 315.

⁶ *Hammel v. Queen's Ins. Co.*, 54 Wis. 72.

⁷ *Kane v. Hibernia Mut. F. Ins. Co.*, 38 N. J. L. 441.

⁸ *Marts v. Cumberland Mut. F. Ins. Co.*, 44 N. J. L. 478.

though this result was strengthened by the fact that there was also a clause that a forfeiture should be an alienation.¹ A clause against alienation, and that where the estate was taken possession of for breach of condition by the mortgagee there should be also a forfeiture of the policy, was held not to restrain the insured from mortgaging while the mortgagor remained in possession and made no entry for foreclosure.² In a policy on a brewery, vats, boiler, &c., it was held a mortgage on the realty was not a "sale, alienation, transfer, conveyance, or change of title," where another clause provided that "an entry for foreclosure of mortgage, or the levy of an execution, or an assignment for the benefit of creditors, shall be deemed an alienation of the property."³

221. The mere seizure of goods by the sheriff under an execution, and closing the window shutters and locking the doors of a building where the goods are, and where they must be kept by terms of the policy, does not divest the whole interest of the insured in the goods; and where there was no clause against it, he may recover for a diminished interest, as he still retains a general property in them, for the levy of the Sheriff is defeasible.⁴ And where a clause provides for forfeiture if the property be "levied upon or taken into possession or custody," a technical seizure, unaccompanied by a change of possession, is not an avoidance.⁵ For instance, a notice of a levy left at a shop, though good as a levy, is not sufficient.⁶ Where the policy provides for a forfeiture for "a levy of an execution," this means a levy on personalty, and does not apply to land.⁷ A clause that a foreclosure shall avoid has been held immaterial in a policy to the mortgagee, as his interest is thereby not diminished, but increased.⁸ The foreclosure intended by the above clauses would presumably be a technical foreclosure;

¹ *Van Deusen v. Charter Oak F. & M. Ins. Co.*, 1 Rob. (N. Y.) 55.

² *Jackson v. Mass. Mut. F. Ins. Co.*, 23 Pick. (Mass.) 418.

³ *Commer. Ins. Co. v. Spankneble*, 52 Ill. 53.

⁴ *Franklin F. Ins. Co. v. Tindley*, 6 Whar. (Pa.) 483.

⁵ *Smith v. Farmers' & Meehan. Mut. F. Ins. Co.*, 89 Pa. St. 287; *May v. Standard F. Ins. Co.*, 5 Ont. Ap. 605.

⁶ *Commw. Mut. Ins. Co. v. Berger*, 42 Pa. St. 285. See *Caraher v. Royal Ins. Co.*, 63 Hun (N. Y.), 82.

⁷ *Colt v. Phoenix F. Ins. Co.*, 54 N. Y. 595; *Ins. Co. v. O'Malley*, 82 Pa. St. 400; *Pennebaker v. Tomlinson*, 1 Tenn. Ch. 598; *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361; *Hammel v. Queen's Ins. Co.*, 54 Ib. 72.

⁸ *Bailey v. Amer. Cent. Ins. Co.*, 13 Fed. R. 250 (S. D. Iowa).

therefore a decree to enforce a vendor's lien and sale thereunder is not within such prohibitions.¹ Nor would exceptional statutory proceedings on a mechanic's be.²

222. It is scarcely necessary to add that these clauses against foreclosure or levy only apply to regular proceedings.³ But where the mistake is corrected, and the equity to redeem gone, the rule might be otherwise. Thus, in *McKissick v. Mill-Owners' Mut. F. Ins. Co.*,⁴ a decree for foreclosure was had, but the description of the mortgage being incorrect, proceedings to correct were instituted within the year allowed for redemption; a decree to amend was made after the expiration of the year, and on a loss after the year it was held the policy was avoided. Foreclosure proceedings to avoid must also be valid. It was held a loan to a foreign corporation on a mortgage in Illinois being valid, the foreclosure thereunder is also valid.⁵ Where a suit was brought in Ohio on a Kentucky contract, and on a question as to whether a levy on the wife's property was valid by the laws of the former State, the Court held, in the absence of evidence to the contrary, that the law of the State where the suit is brought will presumably be held the same as that of the foreign State.⁶ Where the policy is issued jointly to a husband and wife, with a clause against sale or change of interest, the conveyance by the husband to A., who the same day conveyed to the wife, vitiates the insurance.⁷

223. The question frequently arises in policies to co-partnerships in the name of the partners, whether the introduction or withdrawal of a member, or the transfer of the assets *inter se*, will avoid the insurance. Where there is no clause in the policy on the subject, it has been held under the common law pleading that a joint action must be brought on a joint contract, and this could not be done when the personnel of the partnership had been changed by the introduc-

¹ *Pennebaker v. Tomlinson*, 1 Tenn. Ch. 598. Ga. Home Ins. Co. v. Kinnier, 28 Grat. (Va.) 38; *Runkle v. Citizens' Ins. Co.*,

² *Colt v. Phoenix F. Ins. Co.*, 54 N. Y. 595. 6 Fed. R. 143 (S. D. Oh.).
⁴ 50 Iowa, 116.

³ *Hopkins v. Manfg. Co. v. Aurora F. & M. Ins. Co.*, 48 Mich. 148; *Jecko v. St. Louis F. & M. Ins. Co.*, 7 Mo. Ap. 308; *Miami Val. Ins. Co. v. Stanhope*, 9 Amer. L. Rec. 378 (Oh.); *Phila. F. & L. Ins. Co. v. Mills*, 44 Pa. St. 241; 116 N. Y. 317.

⁵ *Commer. Un. Assur. Co. v. Scammon*, 102 Ill. 46.
⁶ *Miami Val. Ins. Co. v. Stanhope*, 9 Am. L. Rec. 378 (Oh.).

⁷ *Walton v. Agricultural Ins. Co.*, 116 N. Y. 317.

tion or withdrawal of a partner, for there would be no joint interest at the loss.¹ The cases supporting this principle have been thought not to decide that an assignment of an interest by one tenant in common or joint tenant to another avoids a policy, but merely that a joint action cannot be maintained, and to turn on a mere question of misjoinder.² In Ohio, there being no clause in the policy against alienation, it was held a sale by one partner of his interest to the others of the firm, who continued the business, will not avoid; and in this case the authorities were reviewed, and the above distinction taken between the questions dependent on the pleading and proper parties to the suit on joint contracts by the common law and the statutes of Ohio, where the real party in interest may sue.³ In Vermont, in *Wood v. Rutland, &c., Mut. F. Ins. Co.*,⁴ the articles of co-partnership provided that, on a dissolution, one of the firm could take the partnership property on payment therefor, and the firm took out a policy on the firm goods, but this agreement was not made known to the insurers. One of the partners died, and the other continued the business in his own name, and then came a loss, and it was held, though the surviving partner in winding up might recover the value of the lost goods of the firm, he could not recover for any bought subsequently to the dissolution.

224. Where there is a clause against a sale or conveyance, it has been held in Pennsylvania,⁵ Virginia,⁶ and Wisconsin,⁷ a transfer of his interest by one partner to his co-partners will avoid the policy. In Illinois,⁸ Louisiana,⁹ New Hampshire,¹⁰ New York,¹¹ Ohio,¹² and

¹ See *Firemen's Ins. Co. v. Floss*, 67 Md. 403; *Howard v. Albany Ins. Co.*, 3 Den. (N. Y.) 301; *McMasters v. Westchester Co. Mut. Ins. Co.*, 25 Wend. (N. Y.) 379.

² *Hoffman v. Aetna F. Ins. Co.*, 33 N. Y. 405.

³ *West v. Cit. Ins. Co.*, 27 Oh. St. 1. See also *Blackwell v. Ins. Co.*, 48 Oh. St. 533.

⁴ 31 Vt. 552.

⁵ *Finley v. Looming Co. Mut. Ins. Co.*, 30 Pa. St. 311.

⁶ *Portsmouth Ins. Co. v. Brinkley*, 2 L. J. 842 (Va.).

⁷ *Keeler v. Niagara F. Ins. Co.*, 16 Wis. 523.

⁸ *Allemania F. Ins. Co. v. Peck*, 133 Ill. 220.

⁹ *Dermani v. Home Mut. Ins. Co.*, 26 La. An. 69.

¹⁰ *Pierce v. Nashua F. Ins. Co.*, 50 N. H. 297.

¹¹ *Hoffman v. Aetna F. Ins. Co.*, 32 N. Y. 405, 145. See also *Dresser v. Un. F. Ins. Co.*, 45 Hun (N. Y.), 298. But see *Murdock v. Chenango Co. Mut. Ins. Co.*, 2 Coms. (N. Y.) 210; *Tillou v. Kingston Mut. Ins. Co.*, 7 Barb. (N. Y.) 570, 5 N. Y. 405; *Wilson v. Genesee Mut. Ins. Co.*, 16 Barb. (N. Y.) 511; *Dey v. Poughkeepsie Mut. Ins. Co.*, 23 Barb. (Ib.) 623.

¹² *West v. Cit. Ins. Co.*, 27 Oh. St. 1.

Texas¹ an alienation of his assets to the other partners does not avoid. In Massachusetts, under a clause that if "the said property be sold," a sale to a co-partner and a mortgage back of the seller's share was held not to avoid, though the question of the mortgage did not appear to have had any great weight in the decision.² In Scotland, in a policy to a firm, A. & Co., which consisted of A., B., and C., it was provided that the policy should cease to be in force when the property should "pass from the insured to any other person otherwise than by will or operation of law." There was an agreement to transfer the partnership works to B., who appeared to have the principal interest in the concern. A notice of the proposed change was inserted in the "Gazette" that A. had retired and that B. & C. would carry it on under a different name. It was held the transaction could hardly be called an alienation within the clause, as apparently the withdrawal of the other partner could not be considered as contemplated in the clause by the company.³ In Iowa the insured aliened to a firm of which he and two others were members, and it was held not to fall within a clause against alienation, as he still had an insurable interest.⁴ Though this doctrine was repudiated in Connecticut.⁵ In the cases in Iowa, Louisiana, Massachusetts, Ohio, and Texas referred to, the Judges all laid stress upon the fact that the clause in the cases before them only provided for forfeiture in the event of a sale, but did not contain a clause as to change of title or possession, and accordingly in Connecticut,⁶ Illinois,⁷ Iowa,⁸ Indiana,⁹ and Missouri¹⁰ it has been held that a sale by one partner to his co-partners is within such a clause, and there are dicta apparently to the same effect in the Supreme Court of the United States¹¹ and North Carolina.¹²

¹ *Texas Banking & Ins. Co. v. Cohen*, 47 Tex. 406.

² *Powers v. Guardian F. & L. Ins. Co.*, 136 Mass. 108.

³ *Forbes v. Border Counties F. Office*, 11 C. S. C. (3 Ser.) 278.

⁴ *Cowan v. Iowa Ins. Co.*, 40 Iowa, 551.

⁵ *Malley v. Atlan. F. & M. Ins. Co.*, 51 Conn. 222.

⁶ *Ib.*

⁷ *Dix v. Mercant. Ins. Co.*, 22 Ill. 272.

⁸ *Hathaway v. State Ins. Co.*, 64 Iowa, 229.

⁹ *Hartford F. Ins. Co. v. Ross*, 23 Ind. 179.

¹⁰ *Dreher v. Aetna Ins. Co.*, 18 Mo. 128; *Card v. Phoenix Ins. Co.*, 4 Mo. Ap. 424.

¹¹ *Lond. Assur. Corp. v. Drennen*, 15 Ins. L. J. 209 (U. S.).

¹² *Biggs v. Ins. Co.*, 88 N. C. 141. See also *Pierce v. Nashua F. Ins. Co.*, 50 N. H. 297.

A chattel mortgage on firm property by a partner for his own benefit avoids the policy to the firm, under the clause against a change in interest, title, or possession.¹ In Connecticut, where the policy was issued to A., who took in B., and traded as a co-partnership, it was held to be a "change of title."² And in North Carolina there is a dictum to the same effect.³ But in Alabama,⁴ Mississippi,⁵ and Virginia,⁶ under a clause against "change of title or interest," a transfer by a partner of his interest to the others was held not to avoid. It has been held that the introduction of a new partner who takes no interest in the firm property, but is recompensed out of a share of the profits, is not a "change of title" under a policy on the firm's realty.⁷ But where a partnership transferred its assets to a limited liability company formed to receive them, etc., it was held that the assets were "assigned" within a clause of the policy, though the members of the old partnership held nearly all the shares of stock.⁸

To avoid, however, in any event a contemplated alienation or change of title must be carried into effect.⁹ Thus, in *Hill v. Cumberland Val. Mut. Protec. Ins. Co.*,¹⁰ there was a clause that a policy "transferred by any contract or change of partnership or ownership" should be void, and it was held that a contract of sale under which no deed was made, nor consideration paid, did not avoid the policy, as the vendor only held it in trust for the vendee. And in the Supreme Court of the United States in *Lond. Assur. Corp. v. Drennen*,¹¹ where a firm had agreed to take in a new partner and form a company, but stipulated that no change in the name or character of the firm should be made till the formation of the new corporation, the mere fact of the new intended partner putting in some money and sharing in the profits was held not to make him a partner in the face of the stipulation.

¹ *Olney v. German Ins. Co.*, 88 Mich. 94.

⁶ *Burnett v. Bufaula Home Ins. Co.*, 46 Ala. 11.

² *Malley v. Atlantic F. & M. Ins. Co.*, 51 Conn. 222.

⁷ *New Orleans Ins. Ass'n v. Holberg*, 64 Miss. 51.

³ *Biggs v. Ins. Co.*, 88 N. C. 141. See also *Pierce v. Nashua F. Ins. Co.*, 50 N. H. 297.

⁸ *Va. F. & M. Ins. Co. v. Vaughan*, 88 Va. 832.

⁴ *Hanover F. Ins. Co. v. Lewis*, 10 So. 297 (Fla.).

⁹ See *Roby v. Amer. Cent. Ins. Co.*, 120 N. Y. 510; *Mann v. West. Assur. Co.*, 19 U. C. Q. B. 314.

⁵ *Peuchen v. City Mut. F. Ins. Co.*, 18 Ont. Ap. 446.

¹⁰ 59 Pa. St. 474.

¹¹ 15 Ins. L. J. 209 (U. S.).

In New York in *Keeney v. Home Ins. Co.*,¹ the condition against sale or transfer of the property, or change in title or possession, was held not to apply where the appointment of a receiver, a co-partner, was made *pendente lite* in an action to dissolve the partnership. It has been held in a suit on a policy to a firm, that a mortgage by a partner of his undivided third interest, and a judgment which became a lien, is within a clause against subsequent incumbrance.² But where the charter provided that one who had claimed the homestead exemption shall not be a member of the company, a claim by A. of the homestead was held not to avoid policy issued to A. & B. on firm assets.³

225. Where the subject-matter of the insurance which is aliened is personalty and is replaced by similar articles of the same general character, a recovery under a policy has been allowed in cases where the insurer could reasonably contemplate such an alienation. In *Cummings v. Cheshire Co. Mut. F. Ins. Co.*,⁴ A. having insured his house and furniture in two sums, sold the real estate to B., and assigned to him the policy with assent of the insurer, and did not sell the furniture to B., but removed it. B. placed new furniture of the same value in the house, and it was held B. could recover on the house and the amount of the original insurance on the furniture. Where the policy is on goods in a building which are exposed for sale, it may reasonably be supposed that, being for the purpose of sale, the stock will be replenished; and consequently a policy on such will cover not only the original stock, but the stock as replenished, notwithstanding the ordinary clause against sale or alienation.⁵ It has been suggested that there is a distinction between the ordinary sales of merchandise which daily occur, and the alienation of a part of the stock in gross. But it is difficult to see that any exists. In *West Branch Ins. Co. v. Helfenstein*,⁶ there was a clause against "partial transfer or change of title," and the insured sold a part of his stock without notice, and leased the lower part of his store to the purchasers, occupying himself with the balance of the stock in the second floor and in the cellar of his store; and the Court held

¹ 71 N. Y. 396.

⁵ *Lane v. Me. Mut. F. Ins. Co.* 12

² *Hicks v. Farmers' Ins. Co.*, 71 Me. 44; *Wolfe v. Security F. Ins. Co.*, 39 N. Y. 49; *Biggs v. Ins. Co.*, 88 N. C. 141.

³ *West Rockingham Mut. F. Ins. Co.* 141.

⁴ *West Rockingham Mut. F. Ins. Co.* 141.

⁶ 40 Pa. St. 289.

⁵ 55 N. H. 457.

the partial sale did not avoid, as the clause was not intended to apply to the case of merchandise. And in *Wolfe v. Security F. Ins. Co.*,¹ where there was a condition against sale, and A. sold a stock of goods to B., who resold to A.'s wife, to whom by consent the policy was assigned, it was held the sale did not avoid, as it was on a stock of goods for sale, and the policy applied to the goods in the hands of the wife of A. And also in *Lane v. Me. Mut. F. Ins. Co.*,² where the clause was against sale or alienation, in a policy on a stock of goods and the store, and the goods were sold and the store leased, but subsequently the insured took back the store and the residue of goods, it was held not to avoid the policy. Where there is not a bargain and sale of the stock of goods, but a sale of an interest in the stock, this would fall under another principle, namely, the addition to the number of owners of a chattel, which would come under the clause against change in title, etc.³ But it has been held in Ohio, if the interest in the goods after a sale be again vested in the seller before the loss, the policy will reattach.⁴

226. The general clause against the creation of incumbrances has been often held to refer to voluntary incumbrances, and not to include judgments *in invitum*,⁵ or a mechanic's lien.⁶

227. Policies of insurance usually provide against the assignment of the policy, as well as against a transfer or alienation of the property covered, and occasionally the language used does not clearly express against which of the two the prohibition is directed. A clause permitting an assignment of the policy does not necessarily apply to an alienation of the property, as the two are quite distinct.⁷ The clause, "the interest of the assured in this policy is not assignable," and "in case of any transfer or termination of the assured either by sale or otherwise," was held to refer to the transfer of the policy, not of the subject-matter.⁸ The clause, "this policy is not assignable unless by consent of this corporation,

¹ 39 N. Y. 49.

² 12 Mo. 44.

³ See *Biggs v. Ins. Co.*, 88 N. C. 141 ;
Ins. Co. of N. A. v. Lewis, 14 Ins. L. J. 879 (Oh.).

⁴ *Ins. Co. of N. A. v. Lewis*, *supra*.

⁵ *Baley v. Homestead F. Ins. Co.*,
80 N. Y. 21 ; *Richardson v. Can. West
Farmers', Etc., Co.*, 16 U. C. C. P. 430.

⁶ *Green v. Homestead F. Ins. Co.*, 82
N. Y. 517.

⁷ *Jerdee v. Cottage Grove F. Ins. Co.*,
75 Wis. 345.

⁸ *People v. Beigler, H. & D. Lalor*
(N. Y.), 133. See *Hoyt v. Hart. F.*

Ins. Co., 26 Hun (N. Y.), 416.

manifested in writing, and in case of any transfer, either by sale or otherwise without such consent, this policy shall . . . be void," was held to apply only to a sale of the policy, not of the property, and, therefore, a vendor's lien was obviously a sufficient interest.¹ And an endorsement on a policy that it was not assignable as collateral, &c., was held not to apply to an alienation of the property, but only to forbid an assignment of the policy as collateral.²

The clause against incumbrances falling, or to be executed on property during the life of policy, sufficient to reduce real interest of the insured below the value of the property, was held to apply to real and personal property, while the form of the policy was used to insure both kinds usually.³ It has been held in certain jurisdictions that a policy on different subjects, as different pieces of realty or personalty, or realty and personalty, is a divisible contract, and that a forfeiture as to one subject does not vitiate the insurance as to the others.⁴

228. The policy frequently provides that on an alienation the alienee may have the policy confirmed to him on giving notice, and on observing certain proceedings; and when the company consents, on an alienation of the property, to allow the alienee to have the policy assigned to him, there is then substantially a new contract between the assignee and the insurer, and the interest of the assignee, not that of the assignor, is then the question to look to.⁵ This is perfectly legitimate. A cessation of interest in the alienor on an alienation does not make the contract of insurance illegal as a wager, but merely prevents the alienor's recovery upon it; for as the alienor has no interest there can be no indemnity.⁶ The consideration for the new contract on the part of the alienee need not be new in the sense that it need be changed;⁷ but the parties may expressly or impliedly agree that the old premium shall support the

¹ *Merch. Ins. Co. v. Scott*, 1 Pos. German Ins. Co. v. Fairbank, 32 Neb. (Tex.) 534. 750; *Loomis v. Rockford Ins. Co.*, 77

² *Hoyt v. Hart. F. Ins. Co.*, 26 N. Y. Wis. 87; 81 Wis. 366.

416.

³ *Brown v. Commonw. Mut. Ins. Co.*, 41 Pa. St. 187.

⁴ See *German Ins. Co. v. Miller*, 39 Sm. (Ill.) 633; *German Ins. Co. v. York*, 29 Pac. R. 586 (Kan.); *State Ins. Co. v. Schreck*, 27 Neb. 527;

⁵ See *Garland v. Ins. Co. of N. A.*, 9 Brad. (Ill.) 571; *Carpenter v. Providence Wash. Ins. Co.*, 16 Peters, 495.

⁶ See remarks of *Bronson, J.*, in *Howard v. Albany Ins. Co.*, 3 Den. (N. Y.) 301.

⁷ *Fish v. Cottenet*, 44 N. Y. 538.

new contract, the risk being unchanged. But if other property is introduced there is a new contract, and there is needed some fresh consideration. Where, after an alienation of the insured property, the vendor, desiring to cover other property in another part of the town, got the secretary to indorse the policy so that it should cover that property, giving an additional note for an increased premium, it was held the endorsement was void, because the policy was at an end on the alienation; and as it could not be considered as a new policy, because made to defraud the revenue laws and for other reasons, there was no consideration for the note.¹

229. The insured or his alienee must perform the conditions the insurer prescribes, in order that the latter shall be bound on the new contract.² Thus where in a mutual company the policy stipulated that if the insured mortgaged the insured subject for a debt, neither the owner nor assignee of the policy should claim, unless prior to the loss such owner or member should give to the secretary a written undertaking of the mortgagee or assignee to pay all sums that might become due from the member in respect of the insured subject; and the subject was mortgaged, but the member neglected to deliver the undertaking to the defendant, who had notice of the mortgage, and who, without requiring the undertaking, received from the mortgagee sums for which the member was liable, it was held on the pleadings that the policy was avoided, the question of waiver not having been raised, but leave was given to amend in order to raise the question of waiver.³ So on an alienation and an assignment of a policy in a mutual company, which provided that the transferee, being approved by the company and giving security for the notes, may have the policy assigned to him and take the place of the insured, it was held that, unless the assignee do give the proper security and become a member of the concern, he cannot recover.⁴ And where such a clause exists it has even been held, though there may not be a recovery because of the alienee's neglect; yet that if the policy be not surrendered or transferred, the insurer is still

¹ *Mound City F. & M. Ins. Co. v. Curran*, 42 Mo. 374. See also *Davis v. German-Amer. Ins. Co.*, 135 Mass. 251.

² *Sanboken v. Can. Mut. F. Ins. Co.*, Steph. Quebec Dig. 1881, sec. 403.

³ *Hughes v. Tindall*, 18 C. B. 98. See also *Turnbull v. Woolfe*, 11 W. R. 55.

⁴ *Willey v. Mut. F. Ins. Co.*, 2 Dor. (Quebec) 29.

a member and liable to subsequent assessments on his note.¹ In Virginia the eighth section of the Act of 1794 directed that on an alienation of the insured property the subscribers are to apprise purchasers of the property of the insurance, and endorse the policy to him, and the purchaser shall be considered as an original subscriber and become liable for liens, notes, &c. But the Court held this was only directory, and the purchaser was bound though the policy was not endorsed.²

230. Sometimes it is doubtful on devolution by death in whom the right to the policies exists. In *Mildmay v. Folgham*,³ by art. 34 of deed of settlement of the Hand-in-Hand Fire Office of London, it is declared in case of the death of a member that no advantage should be taken by survivorship, but that the interest of such member dying shall survive to his executors, administrators or assigns, who shall be possessed of the policy; and further by an order at a meeting of the society, after reciting that every insurance becomes void when the property of the person insured expires, it was ordered that on applying at the office the insured may get his deposit paid him, but in case he does not, nor assigns his policy to the person having the insured property, such person may insure it. The Court held this was a personal contract only and did not affect the real property; the personal representative has the benefit of the policy, and the heir could come in, but if he does not he cannot take, unless by an assignment. To give the alienee the right to the policy money on a loss the alienation must necessarily give him a good title to the property. But it has been held where, as between vendor and vendee, the title to the thing transferred by a warehouse receipt was valid, though not as against creditors, this was a valid transfer within the policy.⁴

231. The policy usually provides, as a precedent condition, for notice of the alienation or incumbrances. And even the appointment of a receiver of the insurer has been held not to dispense with

¹ *Cummings v. Sawyer*, 117 Mass. 30; *Ind. Mut. F. Ins. Co. v. Coquillard*, 2 Ind. 645, seems to have been put, 3 L. N. (Can.) 239. See also *post*, §§ 931-933.

² *Mut. Assur. Soc. v. Byrd*, 1 Va. Cas. 170.

³ 3 Ves. Jr. 471.

⁴ *Hoyt v. Hart. F. Ins. Co.*, 26 Hun (N.Y.), 416.

its necessity when the policy stipulates for it.¹ In *Conover v. Mut. Ins. Co.*² the secretary gave the required assent. There was a clause running "unless by the consent of the company manifested in writing" the policy is void if the interest of the insured be alienated; and it was held that *prima facie* the secretary's authority would be presumed and evidence of his consent in other cases was admissible. So in *Sanders v. Hillsborough Ins. Co.*³ the secretary and president, it was decided, are presumably the proper persons to give the assent. In *Northrop v. Miss. Val. Ins. Co.*⁴ the corporation was to give the assent, and the acting secretary endorsed it; and subsequently the president made a slight change in the subject-matter to be covered on an alienation; and it was held this was a sufficient assent, there being no particular officers who were required by the laws of the company to do so. The notice must be received as well as sent, for merely entrusting it to an agent to deliver, as the post office, is not sufficient unless the other party may have acquiesced in the selection of the agency.⁵ But it has been held, where a written notice was required, that a letter mailed would raise the presumption of receipt, but was not conclusive.⁶ If written notice to the secretary be required, verbal notice to the agent is insufficient.⁷ When the time within which notice of the existence of incumbrances or alienation is not stated, it must be given within a reasonable time, and a delay of fifty days has been considered fatal.⁸ What is a reasonable time is probably for the jury.⁹ But notice alone is usually not sufficient to permit an alienee to enjoy the benefit of the alienor's policy, for the clauses usually stipulate for the company's assent as well as notice, to continue the policy. The words, if "the assured shall neglect or fail to obtain consent of the company thereto, then and in that case the policy shall be void," were stated to mean, not that the company should consent to new incumbrances, for in the case of an involuntary incumbrance that would be impos-

¹ *Hine v. Woolworth*, 93 N.Y. 75.

² 3 Den. (N.Y.) 254.

³ 44 N. H. 239.

⁴ 47 Mo. 435.

⁵ *McCann v. Waterloo Co. Mut. F. Ins. Co.*, 34 U. C. Q. B. 376.

⁶ *Plath v. Minn. Farmers' Mut. F. Ins. Ass'n*, 23 Minn. 479.

⁷ *Hawke v. Niagara Dist. Mut. F. Ins. Co.*, 23 Grant Ch. (Can.) 139.

⁸ *McGowan v. People's Mut. F. Ins. Co.*, 54 Vt. 211.

⁹ *Mich. State Ins. Co. v. Lewis*, 30 Mich. 41.

sible, but that it should consent to continue the insurance after they existed, as if it did not, it would revoke.¹

No particular form of assent is needful. In *Batchelor v. People's F. Ins. Co.*² the policy was issued to A., who aliened to B.; there was a clause against alienation, and B. took the policy to the insurer's agent, who wrote thereon: "Permission to use kerosene; loss payable to B. Transfer," and put on the revenue stamp which was required for a new policy, but which was not necessary for the endorsement already made. It was held the stamp and the word "transfer" evidently meant that there was a new contract with the alienee, or full assent to the transfer. In *Buchanan v. Westchester Co. Ins. Co.*,³ one of a firm of general agents assented to an alienation and sent the policy to the company with a request to allow the transfer, but the company cancelled the policy, alleging it did not longer desire the risk, and enclosed a check, but before this arrived there was a loss, and it was held the company did not object to the transfer but to the policy, and, as the loss occurred before notice of cancellation, a recovery lay. Where the policy contained the usual clause against sale of the subject-matter unless with the insurer's consent, it was held that an endorsement on the policy that the loss was payable to A. B. with the company's consent was not an implied consent to the sale of the article insured by the insured, but was simply an order to pay, and consistent with a title in the insured.⁴ An assent to an assignment of the policy is impliedly an assent to some species of transfer of the property, for otherwise such consent would be meaningless.⁵ And the company's recognition of the alienee or incumbrancer is an implied assent, certainly by way of waiver.⁶ But where two policies exist on the same property, an assent to an assignment as to one does not necessarily imply an assent to the other.⁷

The assent to alienation and assignment of the policy may be given after its occurrence.⁸ But where alienation is forbidden, un-

¹ *Brown v. Commw. Mut. Ins. Co.*, 41 Pa. St. 187.

² 40 Conn. 56.

³ 5 Alb. L. J. (N.Y.) 334.

⁴ *Bates v. Equitable Ins. Co.*, 10 Wall. 33.

⁵ *Hazzard v. Can. Agricultural Ins. Co.*, 39 U. C. Q. B. 419.

⁶ *Ib.*

⁷ *Loring v. Mfrs. Ins. Co.*, 8 Gray (Mass.), 28.

⁸ *Ill. F. Ins. Co. v. Stanton*, 57 Ill. 354; *Pratt v. N. Y. Cent. Ins. Co.*, 55 N. Y. 505; *Buchanan v. Exchange F. Ins. Co.*, 61 N. Y. 26; *Shearman v. Niagara F. Ins. Co.*, 2 Swec. (N.Y.) 470; *Gilliat v. Pawtucket Mut. F. Ins. Co.*, 8 R. I. 282.

less with consent of the company accompanied by an assignment of the policy in sixty days, the policy must be assigned within the sixty days before loss.¹

It has been held the insurer has the burden of showing a breach of the condition against alienation.² The facts tending to show a forfeiture are for the jury, but their legal effect is for the Court.³

¹ *Dadmun Mfg. Co. v. Worcester Mut. Ins. Co.*, 11 Met. (Mass.) 426. ² *Brown v. Commw. Mut. Ins. Co.*, 41 Pa. St. 187.

³ *Orrell v. Hampden F. Ins. Co.*, 13 Gray (Mass.), 431.

CHAPTER II.

TITLE TO A POLICY IN RESPECT OF PROPERTY,
ON SALE, LEASE, MORTGAGE, DEATH, TRUSTS,
BUILDING CONTRACTS.

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DIVISION I.—SALES.

232. If during a treaty of sale, before the contract is complete, there should be a loss, it will fall on the vendor. As where there

was a bid on a master's sale, which was not complete before his report was confirmed, the vendor was held to bear the loss.¹ But on the completion of the contract, though before a conveyance of the property, the loss falls on the purchaser.² The vendor need not keep up an existing policy on the property, or give notice of its termination before or on the date of the passing of the title.³ If the vendor has a policy on his interest in the premises, and a loss occurs after the signing of the contract, but before the completion of the sale, the purchaser is not entitled, without an agreement to that effect, to the benefit of the insurance on the completion of the contract.⁴ And where, after a foreclosure sale within the year in which the mortgagor may redeem, the purchaser insures and there is a loss, the mortgagor, on redeeming against the sale, is not entitled to the insurance money.⁵ But in *Raynor v. Preston*,⁶ where it was held the vendee, on completion of the sale, was not entitled to the money, there was a *quere* whether the company could compel the vendor to refund the insurance paid him. In Lower Canada, in *Le Claire v. Crapser*,⁷ however, the interest in a vendor's policy was held to pass by operation of law to the vendee, on notice to the company, and on a loss the balance of the policy money over the price due to enure to the vendee as a discharge. It is true in this case there was evidence of a contract by the vendor to insure for the vendee, but the Court seemed to think that in any event the money should enure for the benefit of the vendee. Where the vendor of a leasehold is under a covenant to insure, the purchaser of a leasehold may object to the vendor's title on the ground that he had incurred a forfeiture by omitting to pay his premium pursuant to the covenant, though it did not appear the lessor had taken advantage of the forfeiture.⁸

233. Sometimes it is doubtful whether the vendor's interest in the insurance was intended to be for the whole estate or simply for the

¹ *Chapman v. Gore Dist. Mut. Ins. Co.*, 26 U. C. C. P. 89.

² *Klaiber v. Ill. Benev. Masonic Soc.*, 12 Ins. L. J. 125 (Ill.).

³ *Paine v. Meller*, 6 Ves. 349; *Dowson v. Solomon*, 6 Jur. n. s. 33; *Brewer v. Herbert*, 30 Md. 301.

⁴ *Poole v. Adams*, 10 L. T. n. s. 287; *Rayner v. Preston*, 18 Ch. D. 1; *King*

v. Preston, 11 La. An. 95; *Clinton v. Hope Ins. Co.*, 1 Ins. L. J. 436 (N. Y.).

⁵ *Cushing v. Thompson*, 34 Me. 496.

⁶ 18 Ch. D. 1.

⁷ 5 L. Can. R. 487.

⁸ *Wilson v. Wilson*, 14 C. B. 616; *Palmer v. Goren*, 25 L. J. Ch. 841.

See also *Dowson v. Solomon*, 6 Jur. n. s. 33.

debt due by the vendee. *Prima facie* an insurance on a house by a vendor is an insurance upon the whole estate, legal as well as equitable, and not on the balance of the purchase money. For though the vendor is not bound to insure, or even to continue an insurance already made, he may, like any other trustee having the legal title, insure to the full value of the property. And where the form of the policy shows it on the house and not on the debt, the burden of showing that the insurance was on the latter rests on the underwriter. Usually the premium is decisive of the question; for if on the debt, as the land and responsibility of the vendee would stand as indemnities to the underwriter, who would be entitled to a cession of the vendor's claim, it would be at a lower rate than a premium on the building.¹

234. Where there is an agreement between the vendor and vendee as to the insurance the rule is modified to conform to its terms. On a sale of real estate under seal it has been held that a contemporaneous parol agreement is admissible to show that the policy thereon was intended to enure for the benefit of the vendee.² Where the vendor agrees to keep a policy for the benefit of the vendee the latter becomes the equitable assignee of the policy money on a loss, before the completion of the sale, to the extent of the unpaid price with interest.³

235. One who has acquired a title by levy of execution on the premises of the execution debtor is not entitled to the policy in case of loss by fire.⁴ Where a debtor had taken a policy, payable to his creditor, on property which the latter bought in on an execution for his debt, and then a loss occurred, it was held, on payment to the creditor, that while the purchase of the property was technically an extinguishment of the debt, the creditor was in equity entitled to the proceeds of the policy, crediting the same on the amount of his bid, in case the debtor saw fit to redeem.⁵

236. Where the contract of sale contained an agreement that an existing policy should be assigned with it, which was not done, it was held on a loss that the vendor was liable only for the amount

¹ *Ins. Co. v. Updegraff*, 21 Pa. St. 513.

⁴ *Plimpton v. Farmers' Mut. F. Ins. Co.*, 43 Vt. 497.

² *Parcell v. Grosser*, 1 Atlan. R. 909 (Pa.).

⁵ *Gleason v. First Nat. Bank*, 13 Fed. R. 719 (E. D. Mich.).

³ *Shotwell v. Jefferson Ins. Co.*, 5 Bos. (N. Y.) 247.

of premium required to insure for the unexpired term; for the breach was of a contract of sale, not of insurance, and the damages were not the direct result of the breach of contract, but of the vendee's failure to procure a policy for which the vendor cannot be charged.¹ Where a house insured by the mortgagee at the expense of the mortgagor was sold under a decree of foreclosure, and, with the insurer's consent, the policy was assigned to the purchaser, it was held he must repay the mortgagor the amount of the premium which would cover the future life of the policy.²

237. In the Mutual Assurance Society of Virginia the subscriber to the society is required to apprise the purchaser of insurance on the realty and endorse to him the policy, and when this is done the latter is considered as a subscriber in the room of the original one; and subscribers in default on premiums are compelled to pay the same with interest. An applicant for insurance in that society had not received a policy nor paid the premium, and the vendee of the property was not notified of the insurance until after the payment of the price, and it was held that the purchaser, under the circumstances, was not liable for the premium.³

238. In *Martineau v. Kitching*,⁴ the plaintiffs, sugar refiners, were in the habit of selling to brokers the whole of each filling of sugar, consisting of from 200 to 300 loaves or "titlers" each, the terms always being "prompt at one month, goods at sellers' risk, for two months," the "prompt" day being the Saturday next after the expiration of one month from the sale. The titlers on each filling were stored in the plaintiffs' premises, and from time to time were fetched away by the purchasers, being weighed on their removal, each titler weighing from thirty-eight to forty-two pounds. If the whole of the lots in one sale note were not (as happened occasionally) taken away on the "prompt" day, payment was made by the purchaser at an approximate sum calculated on the probable weight, the actual price afterwards being adjusted on the whole filling being cleaned. The defendants, old customers of the plaintiffs, had bought four fillings, consisting of specific titlers, each marked as above, and had paid the approximate price of the four

¹ *Dodd v. Jones*, 13 Ins. L. J. 799 (Mass.).

³ *Greenhow v. Barton*, 1 Munf. (Va.) 590.

² *Sherman v. Fair*, 2 Spear (S. C.), 647.

⁴ L. R. 7 Q. B. 436.

lots, and had fetched some of each lot away. A fire occurred on the plaintiffs' premises after the expiration of the two months from the dates of sale to the defendant, destroying the whole warehouse. The plaintiffs had floating policies on goods "sold and paid for, but not removed," but there was no understanding with their customers as to insurance, and the money was not enough to cover their own goods, exclusive of the titlers undelivered, which were sold to the defendant. It was held, whether the titlers undelivered had passed or not by the terms of the sale, the risk was in the buyer after two months, and, in the absence of a contract as to the matter, the plaintiffs had a right to the insurance money. In *Neale v. Read*,¹ A. sold goods to B., at whose risk they were shipped, to be paid for by bills drawn upon D. & Co., C. went as trustee for A., and B. was to retain possession until the amount of the bills drawn upon D. & Co. was remitted, and then the bill of lading was to be delivered up to B., who directed D. & Co. to insure at his expense, and a total loss was paid to D. & Co., who credited B. with the money, paying part to B. and part to his assignee in bankruptcy. D. & Co. paid some of the bills and rejected others, and in an action by A. it was held that D. & Co. were not bound to apply the policy money to the discharge of the bills drawn by B. for the goods.

Where there is an insurance by a judgment creditor of a corporation who buys in the property in the joint name of himself and the corporation, and the property is not redeemed from the sale, on a partial loss the policy money should be paid in equity to the purchaser; though if the loss had happened before the sale, or if the debtor had redeemed from such sale, the insurance money might have belonged to it.² Where the owner of an undivided half of a mill sold his interest to B., taking the latter's notes in part payment, and gave a bond for the deed on payment, which B. assigned to C. the other half-owner, and the mill was burned, it was held C., who had insured his interest, need not account to the other owner for any portion of the policy money.³ If the purchaser gets title by fraud as to the consideration on the seller, whereby the sale is subsequently set aside, it will not defeat a recovery on a policy

¹ 1 B. & C. 657.

² *Hammer v. Johnson*, 44 Ill. 192.

³ *Mickles v. Rochester City Bk.*, 11 Paige (N. Y.), 118.

effected by him before the deed of conveyance was set aside ; since the fraud was not as to the execution of the deed, but as to the consideration, and besides it was a fraud on parties not privy to the insurance.¹ But while the insured was the proper person to recover, it was held the vendor, as between the two, was entitled ultimately to the money, which in equity represented the property destroyed.²

239. Where the vendee agrees to insure for the benefit of the vendor, on a loss such vendor will be entitled in equity to the policy money, at least up to the interest of the vendee.³ And where the vendor has assigned the contract of sale, which provided for an insurance by the vendee, and the latter insures in his own name, the assignee is equitably entitled to the money.⁴ And where the buyer, under contract to insure in a conditional sale for the benefit of the seller, takes a policy for himself, it was held that the seller has in equity a better title to it than an attaching creditor of the buyer.⁵ Where a mortgagee of chattels agreed to assign his mortgage to a proposed purchaser of the chattels who agreed to insure for the benefit of the mortgagee, which he failed to do, and the mortgagee insured in his place, and a loss occurred after the purchaser had made a partial payment of the price, it was held neither the partial payment nor the purchaser's liability for the costs of the insurance affected the mortgagee's right to recover.⁶

DIVISION II.—LEASES.

240. By the common law a tenant is liable for rent though the house be destroyed by lightning⁷ or fire,⁸ unless there is some arrangement between the parties to the contract.⁹ Though in Scotland a different rule prevails, and there, if the premises let have been so destroyed or seriously injured that they have become no longer fit for occupation for the purpose for which they were let,

¹ *Phoenix Ins. Co. v. Mitchell*, 67 Ill. 43.

² *Ib.*

³ *Grange Mill Co. v. West. Assur. Co.*, 118 Ill. 396.

⁴ *Cromwell v. Brooklyn F. Ins. Co.*, 44 N. Y. 42.

⁵ *Providence Co. Bk. v. Benson*, 24 Pick. (Mass.) 204.

⁶ *Haley v. Mfrs. F. & M. Ins. Co.*, 120 Mass. 292.

⁷ *Paradine v. Hill, Aleyn*, 27.

⁸ *Izon v. Gorton*, 5 Bing. N. B. 501 ; *Marshall v. Schofield*, 47 L. T. R. S. 406.

⁹ *Packer v. Gibbons*, 1 Q. B. 421.

the tenant may abandon the lease, though the part destroyed must be essential for the purpose for which the lease was made.¹ And the Louisiana Code, following the civil law of Rome, Spain, and France, regards a lease for years as a mere transfer of the thing leased; and if repair is needed, though the injury be caused by inevitable accident, or from the landlord's failure to keep in habitable repair, the tenant may annul the lease or have the rent abated.²

In England, and generally in America, therefore, if the landlord insure for his own benefit, he need not on a loss lay out the policy money on the buildings injured.³ In *Loft v. Dennis*,⁴ in an action for use and occupation of a messuage and lands, the defendant pleaded equitably that before the commencement of such occupation the defendant had become tenant of certain buildings of the plaintiffs, which during the said tenancy had been insured by the plaintiffs against fire, and that by the terms of the insurance it was stipulated that, in case of damage by fire, the insurance office might either pay to the insured the amount of damage, or might restore the buildings; that the buildings were afterwards burned, whereby the value of the premises to defendant was much lessened; that but for the insurance the defendant would have insured the buildings, and that by reason of the said insurance and on the faith that the buildings, if damaged by fire, would be restored, defendant was induced not further to insure them; that the plaintiffs preferred to receive from the insurance office the amount of damage, but did not restore the buildings, though the money so received was sufficient for that purpose, and although requested by defendant to do so, and therefore the value of the defendant's use and occupation was deteriorated and reduced to the sum paid by him into Court. But on demurrer the plea was held bad, as not showing matter which would have entitled the defendant to relief in equity against the plaintiff. And it has been held, after an ejectment, in a suit for mesne profits, that the policy money paid to the landlord was not any part of the damages.⁵ The landlord may, however, intend the policy to be for his tenant's benefit as well as his own; and where a lessor on ground-rent entered for

¹ *Allan v. Markland*, 20 Scot. L. R. 267; *Scottish Un. Ins. Co. v. Mackintosh*, 9 C. S. C. (1st ser.) 310.

² *Viterbo v. Friedlander*, 120 U. S. 707.

³ *Leeds v. Cheetham*, 1 Sim. 46; *Lovett v. United States*, 9 Court of Claims, 479.

⁴ 1 E. & E. 474.

⁵ *Tongue v. Nutwell*, 31 Md. 302.

arrears under a covenant, that he may hold till the arrears are paid, and states an account with the sublessees charging them with the premium, it is for the jury to say whether he intended the insurance to cover their interest, though they objected generally to the account.¹

241. Not infrequently the lease contains a covenant that the landlord shall insure either for his own or for the tenant's benefit. Where there is a covenant in the lease for the tenant to pay an amount in addition to the specified rent equal to the cost of insurance, this confers no authority on the lessee to insure for the lessor, but leaves it optional with the lessor to insure or not, as he pleases.² Where the landlord covenanted to insure, and the tenant had the option to purchase for a fixed sum, but before the time for exercising the option the buildings were burnt, and the landlord received the insurance money, and then the tenant decided to purchase, claiming the insurance money, it was held that under the circumstances the tenant was not entitled to it.³ Where the lessees of a factory under covenant to insure in a specified company underleased to the plaintiff, who covenanted to pay any sum of money expended in fire insurance, and the lessees, in the erroneous belief that the premises which were empty were used for a hazardous trade, paid a large rate for insurance in another office, and sought to recover the amount from the underlessee, the Court restrained the action upon the underlessee undertaking to pay what was properly payable.⁴ The clause "that the lessees shall pay all extra premiums of insurance at which the premises now leased may be insured that the company shall exact in consequence of the business or works done or carried on therein by the said lessees," applies to all extra premiums charged on account of the actual nature of the business, and does not merely contemplate hazardous contingencies which may arise, as the erection of steam engines, etc.⁵ A stipulation by a landlord to repair does not oblige him in Scotland to keep the subject in repair as a result of fire.⁶

242. The proceeds of a policy taken by the tenant belong to him,

¹ *Miltenberger v. Beacom*, 9 Pa. St. 198.

⁴ *Leather Cloth Co. v. Bressey*, 3 Giff. 474.

² *Hidden v. Slater Mut. F. Ins. Co.*, 2 Cliff. 266 (D. R. I.).

⁵ *Platt v. Kerry*, 7 L. Can. J. 80.

³ *Edwards v. West*, 7 Ch. D. 858.

⁶ *Duff v. Fleming*, 8 C. S. C. (3d ser.) 769.

and where the insurer has an option to reinstate, but pays, the lessee need not lay out the money to do so; but secus if there be an express parol promise to the company to do so.¹

243. Where the lessee covenants to repair, etc., he must do so on an accidental fire.² And a devisee under a will with a condition to repair is liable also for accidental fire.³ It has been held where the lessee covenants to repair, except for fire, he is liable for the rent, though the premises are burnt down and not rebuilt.⁴ But where the lease contains such a covenant and the lessor insured, but refused to rebuild, a bill to enjoin him from suing for rent till he had rebuilt was thought proper, though the case went off on another point.⁵ If after the expiration of a lease with covenants to repair, the lessee hold over, he will be presumed to hold over on the same covenants.⁶ Where the covenant is to repair and to insure for a specified sum, the lessee's liability on a fire is not limited under the former covenants to the amount to be insured under the latter.⁷ Where the tenant covenants to repair, and the lessor takes out policies payable to the tenant who pays the premium, on a loss when the lessees collect, but decline to rebuild, that lessor can collect the money paid to the lessees.⁸ Where property was leased for a term of years, and the tenant, who was bound to rebuild, refused to pay the premiums on a policy by the lessor, and after a loss voluntarily rebuilds, the tenant cannot recover from the lessor the policy money paid to him.⁹ Where the tenant covenants to have "the whole house and machinery on the premises constantly insured" the landlord to relieve him of one-half of the premiums, on a loss the tenant is not entitled to have any of the money in respect of the machinery.¹⁰ And though the tenant, in consequence of a *damnum fatale*, was unable to hand over the machinery to the landlord on a loss, this did not relieve the landlord from his obligation to pay his share of the premium.¹¹ If a

¹ Queen Ins. Co. v. Vey, 16 L. T. x. s. 239.

² Bullock v. Dommitt, 6 T. R. 650; Pym v. Blackburn, 3 Ves. Jr. 34; Lovett v. United States, 9 Ct. of Claims, 479.

³ Re Skingley, 3 McN. & G. 221; Gregg v. Coates, 23 Beav. 33.

⁴ Belfour v. Weston, 1 T. R. 310; Holtzapffel v. Baker, 18 Ves. 116.

⁵ Brown v. Quilter, 2 Ambler, § 619.

⁶ Digby v. Atkinson, 4 Camp. 275.

⁷ Ib.

⁸ Hayes v. Ferguson, 15 Lea (Tenn.), 1.

⁹ Ely v. Ely, 80 Ill. 532.

¹⁰ Scott v. Fleming, 9 C. S. C. (3d ser.) 329.

¹¹ Ib.

lessee covenants to erect on the leasehold premises and keep insured a building, and afterwards the builder under a decree enters in possession without a sale, his entry is only permissive, and does not render him liable on the covenants, as it does not make him an assignee of the lease; therefore, if under these circumstances he insure, it does not enure to the benefit of the lessor, nor make the builder liable on the covenants in the lease.¹ A tenant under covenant to insure may insure in his own name up to the full value.²

244. Where a lessee covenanted to insure in the name of, or to assign a policy when taken to, the lessor, a policy in the name of the lessee will be considered in equity as held in trust for the lessor without a formal assignment.³ If the tenant as the agent of the lessor had insured, a creditor of the former is not entitled to the money.⁴ The tenant of a distillery being entitled under the lease to build and carry off if the landlord did not take the buildings, etc., at a valuation, built and insured the distillery and utensils and stock, and on a loss it was held that the landlord was not entitled, as arresting creditor of the tenant, to any part of the value of the buildings consumed.⁵ If the lessee covenant to insure in the landlord's name and add his own, it is a breach.⁶ But a covenant to insure in the names of the lessees and lessor is substantially performed by a policy in the name of the lessor.⁷ A severe exemplification of the enforcement of the covenant by the tenant to insure is had in *Muston v. Gladwin*,⁸ where on a covenant in the lease to "insure and continue insured" in the joint names of the tenant and landlord his executors, etc, or his assigns, with a proviso for re-entry on a breach, the tenant insured in his own name singly, but showed the policy to the lessor, who approved and accepted rent for the next three years ending at Christmas, 1842, during which time the premiums were paid as well as the premium at Christmas, 1842, covering the year 1843, the policy continuing unaltered. In January, 1843, the landlord assigned, and the assignee in the same year brought ejectment for a forfeiture incurred by not insuring in the

¹ *Merch. Ins. Co. v. Mazange*, 22 Ala. 168.

² *Berry v. Amer. Cent. Ins. Co.*, 132 N. Y. 49.

³ *Eberts v. Fisher*, 13 Ins. L. J. 832 (Mich.).

⁴ *Pritchett v. Meehan. & Traders' Ins. Co.*, 27 La. An. 525.

⁵ *Scottish Un. Ins. Co. v. Mackintosh*, 9 C. S. C. (1st ser.) 310.

⁶ 11 Ins. L. J. 732 (Cal.).

⁷ *Havens v. Middleton*, 10 Hare, 641.

⁸ 6 Q. B. 953.

joint names. No notice had been given to the tenant to alter the policy, but the Court held the covenant to insure in the joint names was a continuing covenant, and was not waived by the conduct of the landlord except as to past breaches, and that ejectment lay. A covenant to insure "in some sufficient insurance office" is not uncertain, but means in some office where fire policies are usually effected.¹

245. The tenant must insure up to the requisite amount, though there be another policy that partially covers the interest, as the tenant till that expires can cover the residue.² Under an agreement that the lessors shall insure and the lessees pay all extra premiums for a hazardous use, the lessors to elect the companies, etc., a receipt not under seal taken in full settlement of a policy and of the extra insurances, is a full discharge on the subsequent failure of the companies, and consequent necessity for the lessors to insure elsewhere.³ The tenant must insure within a reasonable time,⁴ and the omission to insure for two months is an unreasonable delay.⁵ Where a tenant under covenant, effected on March 25th an annual policy, which provided it should be for such longer period as the company shall receive the premium and added a space of fifteen days beyond the quarter day for payment of the premium, during which time the company was liable, but the tenant did not renew till the 25th of April following, the company's receipt stating the policy was from Lady Day to Lady Day, it was held the covenant was broken by a failure to pay the premium before the ninth of April.⁶ Though on a covenant to insure, where the tenant created a policy with a memorandum that in case of the insured's death the policy might be continued to his personal representative, provided an indorsement to that effect was made within three months after his death, which, however, was made after the expiration of the time, it was held there was no breach to keep insured, as the insurance was only voidable by the company.⁷ In a lease by A. to B. of White Acre for five years and a half, and of Black Acre for sixteen years, the rent for both for five years and a half to be £120 and £100 for the residue, B.

¹ *Pitt v. Shewin*, 3 Camp. 134.

⁵ *Penniale v. Harborne*, 11 Q. B.

² *Penniale v. Harborne*, 11 Q. B. 368.

368.

⁶ *Pitt v. Shewin*, 3 Camp. 134.

³ *Quincy v. Carpenter*, 12 Ins. J. L. 460 (Mass.).

⁷ *Penniale v. Harborne*, 11 Q. B. 368.

⁴ *Darlington v. Ulph*, 13 Jur. 276.

covenanted to insure the said premises "during the said terms" in the sum of £2000. There was no provision for the reduction of the insurance after the expiration of the five years and a half, and it was held B. was bound to insure Black Acre during the continuance of the longer term in the same amount.¹

246. The Court will not relieve a tenant against a breach of covenant to insure where there has been no conduct on the landlord's part that would raise an estoppel or waiver.² But if the conduct of the landlord has induced the tenant to believe that he has himself effected the insurance the tenant will be excused;³ and *quere* whether under a covenant that if the lessee did not insure, the landlord might do so and distrain for the premiums, the lessee's omission would incur a forfeiture.⁴ It was held in *Brant v. Gallup*,⁵ that the landlord cannot with the knowledge of the tenant's failure to insure stand by for two consecutive years and after a loss claim indemnity for a breach, as he should have insured himself. In *Knight v. Rowe*,⁶ the lessee covenanted to insure in the joint names of himself and the lessor up to two-thirds of the value of the premises, but insured in his own name only, and in a less amount. Both parts of the lease, however, remained in the possession of the lessor, and the lessee had only an abstract of the lease, which did mention the covenant as to the joint names, and the lessor had previously insured. It was held the conduct of the lessor was such that he could not recover against the lessee for the failure to perform the covenant strictly.

247. In an action of ejectment for a breach of the tenant's covenant to insure, the plaintiff must prove his case. Evidence of a refusal by the tenant to exhibit a policy or receipt for premiums, after which the landlord accepted rent and made no further inquiry till the action was brought, is not sufficient; the plaintiff giving notice to produce these at the trial which was not done on demand.⁷ But it has been held sufficient to show that the premises are not insured, to call a clerk of the insurance office who enters the policies and premiums in the designated office, who will testify that he has,

¹ *Heckman v. Isaac*, 6 L. T. N. S. 383.

² *Green v. Bridges*, 4 Sim. 96. See also *Meek v. Carter*, 4 Jur. N. S. 992; *Rolfe v. Harris*, 2 Price, 206.

³ *Pittman v. Sutton*, 9 C. & P. 706.

⁴ *Ib.*

⁵ 14 Ins. L. J. 497 (Ill.).

⁶ 2 C. & P. 246.

⁷ *Bridger v. Whitehead*, 8 A. & R. 571.

after search, been unable to find an entry of insurance; though where the assignee may insure the clerk must be shown to have searched under both names.¹ It was held in New Jersey where the tenant, who had engaged to procure insurance in the name of his landlord and at his own expense, wrongfully obtained possession of a policy and passed it fraudulently to the landlord, the insured, there cannot be a recovery on the policy, as the tenant is the agent of the landlord, and the latter is affected by his acts.² Where a lessee covenanted to insure the leased premises in the joint names of himself and lessor, the policy money to be expended in reinstating, and assigned them by way of mortgage, but the mortgage deed did not notice the policy; on a loss and a reinstatement by the mortgagee, the mortgagor was decreed to deliver up the policy and join with the lessor in signing the receipt of the insurance office to enable the mortgagee to get the money.³

248. A covenant by a lessee to insure in the name of a lessor, the insurance money to be expended in the erection of new buildings, was held to run with the land.⁴ And a covenant to insure against fire, premises situate within the weekly bills of mortality mentioned in the Act of 14 Geo. III., c. 78, is also a covenant running with the land.⁵

249. In England various statutes have been passed to relieve against forfeitures for breaches by tenants to insure.⁶ By the Statute of 14 Geo. III., c. 78, section 83, after the preamble to the effect that it is to deter ill-minded persons from setting fire to their own houses with a view to gaining the insurance money, it is enacted that the directors of the insurance companies may, and are required "upon the request of any person or persons interested in any house, &c., which may be burnt, to cause the money to be laid out in rebuilding; it has been held that this section is limited to the preamble, which confines it to the cities of London and Westminster and the bills of Mortality;⁷ and *semble* by the Earl of Selbourne

¹ Chaplin v. Reid, 1 F. & F. 315.

² Millville Mut. M. & F. Ins. Co. v. Colterd, 38 N. J. L. 480.

³ Garden v. Ingram, 23 L. J. Ch. 478.

⁴ Douglass v. Murphy, 16 U. C. Q. B. 113.

⁵ Vernon v. Smith, 5 B. & Al. 1.

⁶ For example, the Act of 22 & 23 Vict., c. 31 (Lord St. Leonard's Act);

the Act of 44 Vict., c. 41. In Page v.

Beunnett, 2 Giff. 117, it was decided the Court had jurisdiction to grant relief when the date of the lease was prior to the Act; and in Quilter v. Mapleson, 9 Q. B. D. 672, the later Act was held not confined to breaches taking place after its passage.

⁷ *Ex parte Leney*, 10 L. T. N. S. 697.

and Lord Watson, the Act does not apply to Scotland.¹ In order to avail one's self of the above Act the owner must make a distinct request at the insurance office to apply the money before it has settled with the tenant; and in no case can he claim the policy and the rebuilding by the tenant.² But the Act does not apply where the tenant had insured in his own name as well as the lessor's when he was under covenant to insure only in that of the lessor.³ Nor does it apply to trade fixtures.⁴ Where a tenant under covenant to insure in consequence of his agent's embezzlement failed to pay the premium but the landlord, after finding it out paid it, and allowed the tenant to repay him, this would constitute such a waiver of forfeiture of the lease as to bring the tenant within the exception in s. 6 of 22 & 23 Vict., c. 35, and to preclude him from obtaining relief under the Act of 23 & 24 Vict., c. 126, s. 2, as the statute which makes the indulgence possible limits it to a case where there has been no previous indulgence.⁵

DIVISION III.—MORTGAGES.

250. Though the mortgagor and mortgagee may each insure,⁶ their interests are quite distinct. The mortgagor has an interest as owner in the whole estate, while the mortgagee has only an interest in his debt.⁷ A mortgagor taking out a policy on the mortgaged premises for his own benefit need not account to the mortgagee for any of the policy money paid on a loss.⁸ Where a mortgagor insured and the mortgagee made a sale of the premises and the purchaser insured, but the sale was set aside, on a bill filed by the mortgagor to account as to the policy money received by the purchaser, it was held not to prevent a recovery by the mortgagor on his policy.⁹

¹ *Westminster F. Office v. Glasgow Co. Mut. Ins. Co. v. Woodruff*, 2 Dutch. Provident Invest. Soc., 13 Ap. Cas. (N. J.) 541.
699.

² *Simpson v. Scot. Un. Ins. Co.*, 1 H. & M. 618.

³ *Penniale v. Harborne*, 11 Q. B. 368.

⁴ *Ex parte Gorely*, 4 DeG. & J. & S. 477.

⁵ *Mills v. Griffiths*, 45 L. J. Q. B. 771.

⁶ See *ante*, §§ 164, 165.

⁷ *Carpenter v. Providence Washing-*
ton Ins. Co., 16 Pet. 495. See *Sussex*

⁸ *Ridley v. Ennis*, 70 Ala. 463; *Ryan v. Adamson*, 57 Iowa, 30; *Carter v. Rockett*, 8 Paige (N. Y.), 437; *Traders' Ins. Co. v. Robert*, 9 Wend. (N. Y.) 404; *Nichols v. Baxter*, 5 R. I. 491; *Columbia Ins. Co. v. Lawrence*, 10 Peters, 507; *Carpenter v. Providence Wash. Ins. Co.*, 16 Ib. 495.

⁹ *Commer. Un. Assur. Co. v. Scammon*, 126 Ill. 355.

Where a mechanic has a lien on a property, before his bill is filed he has no claim on an insurance effected by the owner and assigned after the loss to a mortgagee of the property.¹ A surety who enters into a bond conditioned that the mortgagor should insure the buildings mortgaged is discharged by a subsequent increase of risk by a change in the position of the buildings.² A mortgagee in possession need only make ordinary repairs.³

251. Frequently the mortgage contains a covenant that the mortgagor or mortgagee shall insure; though in the absence of any agreement a mortgagee in possession is not entitled to charge for premiums on a fire policy on the mortgaged property.⁴ And a mortgagee cannot as against a subsequent incumbrancer, though his mortgagor failed to perform his covenant to do so, himself insure and add the premiums in the absence of an express contract.⁵ In Scotland it was held as against a junior incumbrancer, that the senior mortgagee in possession cannot insure and credit premiums in the absence of express contract, and the same rule would apply to one not in possession.⁶ Where a mortgagee leaves it to the mortgagor to pay the premiums and keep up the policy, the mortgagee has no separate rights, but is bound by the contract of the mortgagor, who on a novation by the company insuring pays to a wrong party and thus makes a new contract.⁷ Where a loss occurs under a policy to a mortgagor under covenant to insure, and the mortgagee is notified of an adjustment and the insurer's readiness to pay, but neglects for a month to collect the money, during which time the insurer becomes insolvent, this is *prima facie* negligence in the lender.⁸ On an insurance by a mortgagor, loss payable to the mortgagee, the insurer must pay the whole claim up to the value of the property,⁹ and the mortgagee will hold the surplus over the debt for the mortgagor.¹⁰ But when the premiums are once paid to the company, the mortgagor has no further interest in them and cannot contend that

¹ Gaylon v. Ketchen, 85 Tenn. 55.

⁷ Werninck's Case, Reilly, Alb. Arb.

² Grieve v. Smith, 23 U. C. Q. B. 23. 101.

³ Beckman v. Wilson, 11 Ins. L. J. 732 (Cal.).

⁸ Charter Oak L. Ins. Co. v. Smith, 43 Wis. 329.

⁴ Bellamy v. Brickenden, 2 J. & H. 137. Though see *Re Bogart*, 28 Hun. (N. Y.) 466.

⁹ Kane v. Hibernia Mut. F. Ins. Co., 38 N. J. L. 441; *State Ins. Co. v. Maackens*, 38 Ib. 564.

⁵ Brooke v. Stone, 34 L. J. Ch. 251.

⁶ Pollock v. Marnock, 31 Scot. J. 671.

¹⁰ Baltis v. Dobin, 67 Barb. (N. Y.) 507.

the amount of the debt, due by him on the mortgage agreement to insure, is the premium less the commission paid by the company to their agent, who was also agent of all the parties and solicitor.¹

252. Where the mortgage authorized insurance on the premises in a certain amount at the expense of the mortgagor, which the mortgagee took in a greater amount, it was held he was entitled to recover the premiums paid for such excess.² Where an assignment of a chattel as security for a debt contained a covenant to insure, but no provision as to the application of the policy money in liquidation of the debt, and the assignor insured, it was held that the assignee had no claim on the policy money; for the policy did not pass by the deed of assignment, and there was no implied agreement that the money should be applied in liquidation of the mortgage; it was, however, for the assignee's benefit that the assignor should insure, as he would be in a more solvent condition.³ Where A., a mortgagor, under covenant to insure to secure \$3650, with right in the mortgagee to do so if A. did not, made a mortgage to C. to secure \$3000 with a similar provision, and later sold three-fourths of the property subject to the mortgages to B., who assumed the payment of the amounts thereon due and insured up to \$5000, payable to the mortgagees, and who previously had become owner of the one-fourth left subject to the first mortgage, on a loss in excess of the insurance it was held the mortgagees were entitled to be rateably paid before B.⁴ B., mortgagor of a factory with two mortgages on it, insured the machinery at \$2700, loss payable to A., one of the mortgagees, and subsequently conveyed them subject to the mortgages, of one of which B. became assignee afterwards. The company paid A. whose mortgage was only \$2051, a total loss, the assignees in insolvency of the mortgagor recovering the balance of \$649 from A. B. then took an assignment of the other mortgage and sued the assignees in insolvency to recover the money paid them by A., but it was held B. could not recover, as the interest insured in any event was the mortgagor's and only payable to A. up to his mortgage.⁵ In *Bailey v. Ætna Ins. Co.*,⁶ the purchaser at

¹ *Leete v. Wallace*, 58 L. T. n. s. 577.

⁵ *Wilson v. Hill*, 3 Met. (Mass.) 66.

² *Conover v. Grover*, 31 N. J. Eq. 539.

³ *Lees v. Whiteley*, L. R. 2 Eq. 143.

See *Schofield v. New Brunswick Patent Tanning Co., P. & T. (N. B.)*, 599.

⁴ *Baltis v. Dobin*, 67 Barb. (N. Y.)

⁶ 10 Allen (Mass.), 286.

a mortgagee's sale gave a note to the mortgagee, and a new mortgage in part payment of the price, and the owner of the equity of redemption of the first mortgage became also the owner of the equity of redemption as to second mortgage, and insured payable to the mortgagee, but omitted to state which mortgage title was intended, the Court held the title of the second mortgage would be considered to be the one referred to. Where A. was authorized to insure B.'s premises and charge him as security for advances, C., who had a mortgage on them, the lien stipulating that B. should insure for him, or in default that C. should insure at B.'s expense, it was held that C., in the absence of an understanding with A., could not claim on the policy, though he had an equitable lien on the balance of the proceeds due B.¹ If a mortgagor under covenant to insure represented that there was a policy in a certain company on the premises, which the mortgagee then agreed to take, but the mortgagor assigned to him instead a policy in another company on a house which at the time of making the mortgage was on the premises, and retained the first policy, which was on a new house erected in the place of the one on which the assigned policy had been, it was held the mortgagee was entitled to the first policy.²

253. On the mortgagor's failure to keep his covenant to insure, the mortgagee can do so and charge the mortgagor with the premiums.³ And where the mortgagor had taken out a policy and subsequently stopped paying the premiums, the mortgagee may pay them and add them to the mortgage debt.⁴ And it has been held if the mortgagor under a covenant to insure for the benefit of the mortgagee do not do so, but keeps up an existing policy, or insures for his own benefit, the mortgagee will be considered as equitably entitled to the benefit of the insurance, as it will be presumed the policy was taken out in pursuance of the agreement, and he will have a lien on the fund.⁵ And this lien has been held to exist even

¹ *Wheeler v. Factors' & Traders' Ins. Co.*, 9 Ins. L. J. 876 (U. S.). *Davis*, 2 McCart. (N. J.), 30, and *Northw. Mut. L. Ins. Co. v. Drown*, 10

² *Doughty v. Van Horn*, 29 N. J. Ins. L. Jour. 377 (Wis.), as to the time of the application for repayment of the

³ *Dobson v. Land*, 4 DeG. and S. 575. premiums to the mortgagee, and rules of practice.

⁴ *Fitzwilliam v. Price*, 4 Jur. n. s. 889. See also *Washburn v. Wilkinson*, 539; *Thomas v. Von Kapff*, 6 G. & J. 59 Cal. 538; *Stonington Savings Bk. v.*

⁵ *Wilson v. Hakes*, 36 Sm. (Ill.), 372; *Ames v. Richardson*, 29 (Md.) 372.

where there was a provision that the mortgagee could insure, in the event of the mortgagors omitting to do so for the mortgagee.¹ But in *Stearns v. Quincy Mut. F. Ins. Co.*,² where there was the usual covenant to insure the buildings by the mortgagor, who more than a year afterwards insured the buildings and personalty, it was held there could be no recovery by the mortgagees against the insurer, because an executory agreement alone will not amount to an equitable assignment of a chose in action or property not then in existence; but there must appear some agreement or delivery after it comes into existence, which did not appear in the case: for the policy was on realty and personalty; a year had elapsed before the insurance had been taken, and the fact of the policy was not communicated to the mortgagee till after the loss. In other words, there must appear facts to raise the inference, by estoppel or otherwise, that the insurance was obtained with an intent to fulfil the covenant, when such a lien is set up by the mortgagee.

254. It has been held that the mortgagor's covenant to keep the property insured does not run with the land.³ Nor will the recording of a mortgage containing this covenant charge a subsequent incumbrancer with constructive notice of the covenant.⁴ And *semble*, even if it appeared that a junior mortgagee had notice of the insurance covenant in a senior mortgage, that he would take the policy money due on a policy by the mortgagor under a covenant to insure made payable to the junior mortgagee, in the absence of notice that the senior mortgage covenant had not been performed, while without actual notice he would certainly take it.⁵ It was, however, held in *Re Sands Ale Brewing Co.*,⁶ that a mortgagor's covenant when recorded is a covenant that runs with the land and is notice to subsequent creditors.

255. In an insurance by the mortgagee for his own benefit it has been held payment of the insurance money does not extinguish the debt, as the mortgagor has no interest in the policy.⁷ In *Haley v.*

Minn. 330; *Carter v. Rocket*, 8 Paige (N. Y.), 437; *Dunlop v. Avery*, 89 N. Y. 592; *Nichols v. Baxter*, 5 R. I. 491; *Re Sands Ale Brewing Co.*, 3 Biss. 175 (N. D. Ill.); *Greet v. Cit. Ins. Co.*, 5 Ont. Ap. 596.

¹ *Nichols v. Baxter*, *supra*. See also *Wheeler v. Ins. Co.*, 101 U. S. 439.

² 124 Mass. 61.

³ *Reid v. McCrum*, 91 N. Y. 412; *Dunlop v. Avery*, 89 N. Y. 592.

⁴ *Dunlop v. Avery*, 89 N. Y. 592.

⁵ *Id.*

⁶ 3 Biss. 175 (N. D. Ill.).

⁷ *Honoré v. Lamar F. Ins. Co.*, 51 Ill. 409; *Ely v. Ely*, 80 Ill. 532; *Mc-*

Mfrs. F. & M. Ins. Co.,¹ a mortgagee insured for \$57,000 agreed to assign the mortgage for \$62,000, and was paid \$20,000 before it had been assigned, when a loss to the extent of \$53,000 occurred, and it was held his interest was not diminished by such partial payment. In *Glasgow Provident Invest. Soc. v. Westminster F. Office*,² the proprietors of mills granted bonds over them to certain parties, and then granted postponed bonds to others; the prior bondholders insured for themselves and the owner in reversion, and the postponed bondholders also insured in another company for themselves and the owner in reversion, the owner paying the premiums. On a loss the company paid the prior bondholders sufficient to reinstate, but they reduced their bonds; and in a subsequent suit by the postponed bondholders with the consent of the owner against their insurers, in which it was admitted that before the fire the property was sufficient to cover all the bonds, but after it not enough for the prior bonds, it was held a recovery would lie. Where the insured mortgagee, on a loss, gave the money to the mortgagor to rebuild, it was held to be payment to the extent of the mortgage debt.³ And where a bailee states that the bailor need not insure, for he has sufficient to cover the property, the insurance held by the bailee must be applied to the effects of the bailor.⁴ Where the insurance is effected by the request or authority of the mortgagor at his expense, perhaps payment by the insurer to the mortgagee would be an extinguishment to that extent of the mortgage debt.⁵ Where a mortgagee, who was under a covenant to insure, which stipulated on his failure to do so, that the mortgagor should, insured and assigned the mortgage to an assignee, who proceeded to get a judgment in a foreclosure suit for the premiums expended in insurance, and after a loss got a judgment for the deficiency on the sale of the estate against the mortgagor, which the company paid only after an assignment of the judgment, it was held that the agreement was to insure for both parties, and the money should have been applied to the mortgage debt; that the payment by the company for the

Intire v. Plaisted, 68 Me. 363; *Concord Un. Mut. F. Ins. Co. v. Woodbury*, 45 Me. 447; *White v. Brown*, 2 Cush. (Mass.) 412; *Pendleton v. Elliott*, 67 Mich. 496; *Louden v. Waddle*, 98 Pa. St. 242.

¹ 120 Mass. 292.

² 14 C. S. C. (4th Ser.) 947.

³ *Seybold v. Garceau*, 32 L. Can. J. 316.

⁴ *Thomas v. Cummysky*, 108 Pa. St. 354.

⁵ *Bradford v. Greenwich Ins. Co.*, 8 Ab. Pr. (N. Y.) 261.

deficiency cancelled the judgment, and that the company took nothing by the assignment; for an agreement between a mortgagor and mortgagee cannot be qualified by an agreement between the company and one of them.¹ But where there was a policy to the owner, with the loss made payable to A. and the plaintiff mortgagees as interests shall appear, it was held the plaintiff was entitled to the whole sum, where the owner and A. had assigned to him, though payments had been made by the owner to the plaintiff to reduce the mortgage debt, *pendente lite*, the recovery being less than the amount due on the owner's mortgage.² In *Callahan v. Linthicum*,³ the buyer gave a mortgage to the seller, who had a policy on the property, to secure the price, and the sale was notified to the insurer, who had a lien on the property; on a loss afterwards the insurer paid the mortgagee on his promise to apply the money to the mortgage debt, or pay the mortgagor; but after payment of the mortgage debt, however, the mortgagee refused to comply with his promise, and it was held the mortgagee must pay the mortgagor the money; for the continuation of the policy to the new owner was a good consideration to support his promise, and this was proved by the fact that company did not ask for subrogation to which their lien entitled them, and the policy evidently was not on the interest of the mortgagee vendor. Where a policy was in the name of the mortgagee parol evidence was admitted to show an agreement that the mortgagee should insure as well for the mortgagor as for his own benefit, as this would not affect the contract between the insured and the insurer, and was vital to show that the mortgagor was to have the money applied to his debt.⁴

256. It has been held in Massachusetts that money paid to a mortgagee in pursuance of the company's agreement with the mortgagor, cannot be applied at the instance of the second mortgagee to the liquidation of the mortgage debt, if the mortgagor object on the ground that it is not due.⁵ Nor where the money is applied by the mortgagee in reinstating, can a second mortgagee have it applied in reduction of the debt secured by the first mortgage.⁶ The same

¹ *Waring v. Loder*, 53 N. Y. 581.

² *Northw. Mut. L. Ins. Co. v. Germania F. Ins. Co.*, 40 Wis. 446.

³ 43 Md. 97.

⁴ *Kernochan v. N. Y. Bowery F. Ins.*

Co., 17 N. Y. 428. See also *Richardson v. Home Ins. Co.*, 21 U. C. C. P. 291.

⁵ *Gordon v. Ware Sav. Bk.*, 115 Mass. 588.

⁶ *Ib.*

rule was applied by Gresham, J., in the United States Court for Northern Illinois.¹ Where a trustee was required to insure for the benefit of the holder of notes secured by realty, and the insurance money on the mortgaged premises is collected by the trustee, it is not his duty to apply the money to the loan, the mortgagor not being in default, or give it to the mortgagor on his mere promise to rebuild. But his offer to pay on completion of a building was considered proper: and when such money is deposited in a bank, at the mortgagor's request during the rebuilding, on the failure of the bank the mortgagor cannot be credited with the amount of the money.² Where a policy was procured, running in terms to a life-tenant as additional security under the covenants of a mortgage jointly executed by such life-tenant and the owners of the reversion, but which the circumstances of the case showed to be for the joint benefit of all the mortgagors, it was held the authority of the life-tenant to procure the policy would not allow him to waive the application of its proceeds to the mortgage debt, nor was the silence of the reversionary owners evidence of waiver.³ And if in any event in such a case the life-tenant could agree with the mortgagee to apply the proceeds of the insurance on the mortgaged premises, he was bound to see the money was so used.⁴

DIVISION IV.—DEATH, TRUSTS, ETC.

257. On the insured's death a policy on realty was held to go to the heir-at-law.⁵ Where a fire policy is to A., his heirs, etc., and a clause provides, "except by succession by reason of death of the assured" on a change of title, it shall be void, a widow having a life-interest in the realty insured through a nuptial contract, has no interest in the policy, for she does not take by succession.⁶ Where a decedent had a policy against fire on realty and the loss occurs after death during the term of the policy, it has been held that the insurance money goes to the administrator, and that the creditors take before heirs.⁷ On a partial loss on a fire policy, on realty

¹ *Bryant v. Charter Oak L. Ins. Co.*,
24 Fed. R. 771 (M. D. Ill.).

⁴ *Ib.*

² *Fergus v. Wilmarth*, 7 N. East. R.
508 (Ill.).

⁵ *Wyman v. Wyman*, 26 N. Y. 253.

³ *Conn. Mut. L. Ins. Co. v. Scam-*
mon, 15 Ins. L. J. 415 (U. S.).

See *Richardson v. German Ins. Co.*, 89
Ky. 571.

⁶ *Quarles v. Clayton*, 87 Tenn. 308.

⁷ *Nichol's Ap.*, 128 Pa. St. 428.

after the owner's death, it was held the life-tenant and reversioner each was entitled to have the money applied to the repair of the building, since it is obviously for the interest of all to prevent dilapidation of the building.¹ In a policy effected on the homestead by the testator, whose widow on his death was entitled to a life-estate therein, and during her occupancy a total loss took place, it was held the money should go to those interested in the realty, and the widow was entitled to the use of the money during her life, the policy not being personalty, but intended to supply the loss of the realty alone.² Where after the death of the insured the policy money was used to repair the building assigned for the widow's dower, the residue was considered as personalty and went to the widow to the extent of her interest and then to the heirs.³ A widow need not apply the policy money on her estate in the homestead to a rebuilding.⁴ Where the insured died intestate, leaving a widow and an infant son, and the widow qualified as administratrix, and kept on foot an old fire policy, it was held a Court of Equity could compel the company to pay where there was a doubt whether it was realty or personalty.⁵ Where a testator charged his real estate with an annuity to his widow, and, subject thereto, devised all his estate to A., and a policy on a house insured by the testator, which expired after his death, was renewed by A., who was executrix also, on a subsequent loss on a motion by the widow, in a suit substituted by her for the administration of the estate, the money was ordered to be paid into Court, Sir Launcelot Shadwell, V. C., thinking the policy money should not be considered as a part of the testator's general personal estate, but as a trust for the parties interested in the realty.⁶ Where the testator insured, by a covenant of insurance on the property to himself and his heirs, etc., devised to his wife for life with a remainder over on a total loss it was held the covenant worked no special destination of the policy money, and the life-tenant was entitled to it, as personalty for life, with the remainder in the same to the remainder people, as it is doubtful if a

¹ *Brough v. Higgins*, 2 Grat. (Va.) 408.

² *Culbertson v. Cox*, 29 Minn. 309.

³ *Hudnall v. Burkle*, 11 Pac. L. R. 27.

⁴ *Home Ins. Co. v. Field*, 42 Ill. Ap. 392.

⁵ *Portsmouth Ins. Co. v. Reynolds*, 32 Grat. (Va.) 613.

⁶ *Parry v. Ashley*, 3 Sim. 97.

full restitution would always be desirable.¹ Where, during the infancy of a tenant in tail, in strict settlement, the rents were received by his mother on his behalf, who thereout kept up a policy effected in her name on some of the realty, and the settlement contained no provision for fire insurance, and it was not considered desirable to rebuild, it was held the policy money should be treated as personalty for the tenant in tail.² In *Norris v. Harrison, A.*,³ the life-tenant, with a remainder over to B. for life, and the remainder to A. in fee, having insured certain buildings which were destroyed, invested the policy money in the funds, and devised the realty to C. and his personalty to B., who applied part in repairing the buildings and left the rest standing in A.'s name; B., mentioning the facts in his will, bequeathed his personalty to D., and it was held the unapplied money of the policy was subject to the uses of the original settlement and went to A.'s devisee C. Sir Thomas Plumer, V. C., who heard the case, did not decide the general principle, but his decision went on the ground that the testator B. thought he was not entitled to the fund, as he mentioned all the circumstances in his will, and apparently set it apart for the remainderman, thus abandoning it, and those claiming under the testator could not dispute his abandonment of a claim on this fund; but the Vice Chancellor, while he considered the money to belong to the uses of the original settlement, did not allow A.'s devisee to get the money already laid out by B. on the buildings. In *Durrant v. Friend*,⁴ the testator gave specific chattels to a legatee, and his residuary estate to his executors, but took them insured on a voyage to India, during which he was lost, and the executors got the insurance money. On a suit for administration it was held that as the testator and the chattels had perished together, the legatee took no interest in the chattels, and, therefore, none in the money, but it went to the residuary legatees.

258. A policy issued "to the heirs and representatives of A., deceased," might be considered to include B., the executrix and trustee of the estate of A., who took title.⁵ *Seem*, an insurance effected by heirs after the death of their ancestors should go to them notwithstanding the liability of the estate to creditors for the

¹ *Haxall v. Shippen*, 10 Leigh (Va.), 536.

³ 2 Mad. 268.

⁴ 5 DeG. & S. 343.

² *Warwick v. Bretnall*, 23 Ch. D. 188.

⁵ *Savage v. Long Island Ins. Co.*, 43 How. Pr. (N. Y.) 462.

ancestor's debts.¹ On a loss on a policy taken by a life-tenant, where the property is not rebuilt, the money goes to the remainderman, and the life-tenant takes the interest thereon during life.² Where a lady, who had a dower interest in land and was also mortgagee, insured the buildings to a greater extent than her mortgage, stating the property was held for her and her son in trust, and employed part of the proceeds of the policy money paid on a fire in erecting in place of the buildings burned others of less value, it was claimed on a foreclosure on her death by her representatives as a defence that she had intended to insure only her interest as mortgagee, but it was held the facts did not warrant the conclusion that she had intended to insure as mortgagee, as opposed to tenant in dower.³ Where an insurance was made on the premises in the name of all the heirs, and in a partition suit one of them bought, and, on a loss, after the master's sale on partition was confirmed, it was held the loss was on the buyer, but, being one of the heirs, he was entitled, after paying the full price, to the benefit of the policy before a conveyance.⁴ Where an administrator had insured the right of the creditors to resort to the realty for the payment of their debts, it was held to give them an interest, as the insurance must be considered for their benefit.⁵

259. A trustee of realty for others, with a reversion to himself, who has insured not quite up to the life interest in his own name as trustee, owns the policy only as trustee, and it cannot be attached by his private creditors.⁶ The proceeds of a policy effected by trustees on realty, on a determination of the trust, will be regarded as realty and go to the reversioner.⁷ Where a receiver of real estate is directed to insure, and by a subsequent decree A. is declared tenant in tail, and the receiver was directed to pay the balances on the loss to him on a loss, he will be entitled to the insurance moneys.⁸

260. A contract by a builder to build a house on another's land for which he is to be paid on completion, is not discharged by a fire.⁹

¹ *Herkimer v. Rice*, 27 N. Y. 163.

² *Clyburn v. Reynolds*, 31 S. C. 92.

³ *Louden v. Waddle*, 98 Pa. St. 242.

⁴ *Gates v. Smith*, 4 Ed. Ch. (N. Y.) 702.

⁵ *Herkimer v. Rice*, 27 N. Y. 163.

⁶ *Lerow v. Wilmarth*, 9 Allen (Mass.), 382.

⁷ *Hawes v. Lathrop*, 38 Cal. 493.

⁸ *Seymour v. Vernon*, 16 Jur. 189.

⁹ *Adams v. Nichols*, 19 Pick. (Mass.)

275; *Gaylon v. Ketchen*, 85 Tenn. 55.

Nor has the builder a claim to the insurance effected by the owner of the land.¹ Where a carpenter agreed to work on a new house for A., "all work to be paid for as it progressed, by the architects' " order to the carpenter on A., and A. furnished lumber which he sent to the carpenter's shop, to be there prepared to be put in A.'s house which lumber A. insured, and also supplied other lumber which was prepared and placed in the house by the carpenter; on payment of the loss of the lumber in the shop to A., it was held, in a suit by the carpenter for the value of his work on the lumber destroyed, that the words "as the work progresses" in the contract meant as the work upon the house progresses, and that there could be no recovery on the insurance paid to A.: the carpenter had an interest as bailee, and he could have insured.² But if the owner of the ground and contractee accept the house when near completion, he will suffer a loss by fire.³

See *Johnson v. Hunt*, 11 Wend. (N. Y.) 135.

² *Richelberger v. Miller*, 20 Md. 332.

³ *Gaylon v. Ketchen*, 85 Tenn. 55.

¹ *Lawing v. Rintles*, 97 N. C. 350.

CHAPTER III.

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261. A chose in action could not, at the common law, be assigned like a chattel, except to the Crown, for a contract was regarded as a personal transaction only binding upon the parties to it, and as an assignment of a contract or chose in action implies a novation or a substitution of a new party in the place of the retiring one, it could not take place without the common concurrence of the original parties, and on a breach of contract the original party only could sue. But later the assignment of a chose in action without the debtor's assent came to be looked upon as a declaration of trust in favor of the assignee, and the assignee was allowed to sue for the debt, in the name of the assignor in a Court of law, and in his own name in equity.¹ In various States statutes have been passed allowing the assignee to sue in his own name, which will be considered under the head of remedies.²

262. The word assignment, in reference to policies of insurance, is often confusing, as it is employed with several distinct significations.³ Thus, it is used to designate the transfer of a fire policy with the insurer's assent to the vendee of the property covered, in which case the contract itself is assigned and the insurer virtually makes a new contract of insurance with the assignee. The word is also used when a fire or life policy is transferred as collateral security by way of equitable mortgage or pledge, when it operates as an equitable appropriation or transfer of the damages that may be payable on the destruction of the property by the perils for which the insurers have agreed to be answerable. In this last case the fund is assigned, and not the contract. An assignment which transfers the contract is legal, while the deposit or assignment of the fund is an equitable assignment.⁴ When a fire policy is trans-

¹ See Pollock on Contracts (Am. Ed. Lond. F. & L. Ins. Co., 30 Cal. 78; Dickson), *206. Bergson v. Builders' Ins. Co., 38 Cal.

² See *post*, §§ 1205-1208.

³ See, for instance, Bergson v. Builders' Ins. Co., 38 Cal. 541. 541; Gilman v. Curtis, 66 Cal. 116; Stout v. City F. Ins. Co., 12 Iowa, 371; Summers v. U. S. Ins., Etc., Co., 13 La.

⁴ See *ex parte* Kensington, 2 Ves. & An. 504; Ellis v. Kreutzinger, 27 Mo. Bea. 79. See Parlbys Case, Reilly 311; Peabody v. Wash. Co. Mut. Ins. Alb. Arb. 48; Myers v. United Guarantee Co., 20 Barb. (N. Y.) 339; Frank v. & L. Assur. Co., 3 Eq. R. 579; Hampden Ins. Co., 45 Barb. (Ib.) 384; Curtius v. Caledonian F. & L. Ins. Griffey v. N. Y. Cent. Ins. Co., 30 Hun Co., 19 Ch. D. 534; Spencer v. Clarke, (Ib.), 299; Prows v. Oh. Val. Ins. Co., 9 Ch. D. 137; Bibend v. Liv. & Co. 2 Cin. S. C. R. (Oh.) 14; Ins. Co.

ferred to the mortgagee of the property insured it may have a two-fold operation, and it is not always easy to say which is designed. For there are two insurable interests, each of which may subsist and be a ground of action, notwithstanding the determination of the other. When the mortgagor transfers a fire policy to the mortgagee as collateral, it may, with the insurer's assent, be regarded as a transfer of the contract, though the mortgagee may sue in the name of the mortgagor; but it is immaterial that the policy does not attach to the insurable interest of the mortgagee; for if it does not operate to pass the contract of insurance because the assent of the insurers is not given, it can still be construed as an equitable transfer of the fund or the assignor's right to compensation on a loss.¹ The word assignment also refers to a bare deposit of the policy with a third party, which, though not constituting a technical assignment, may yet give a lien.² The word is also employed to assignments of life policies by way of pledge, mortgage, or sale. The payee or person to whom the company has agreed to pay the money in the event of a loss, or the indorsee to whom the insured has directed the company to pay the same, is not the assignee of the contract or policy, but the direction by the insured to pay is an assignment of the fund that may subsequently arise under the contract,³ in which a payee may acquire a vested right.⁴

263. In a contract of insurance in respect of property, as has been observed, there is a *dilectus personæ*, and the policy does not pass as an incident of the property to the alienee.⁵ Though a policy

of Pa. v. Phoenix Ins. Co., 8 Phila. 32; 71 Pa. St. 31; Wells v. Archer, 10 S. & R. (Pa.) 412; True v. Manhattan F. Ins. Co., 26 Fed. R. 83 (Colo.).

¹ See remarks of Hare, P. J., in Ins. Co. of Pa. v. Phoenix Ins. Co., 71 Pa. St. 33-34.

² See Gibson v. Overbury, 7 M. & W. 555.

³ Biddeford Sav. Bk. v. Dwelling-House Ins. Co., 81 Me. 566; Froehly v. N. St. Louis Mut. F. Ins. Co., 32 Mo. Ap. 302; Martin v. Franklin F. Ins. Co., 42 N. J. L. 46; State Ins. Co. v. Maakens, 38 Ib. 564; Hine v. Woolworth, 93 N. Y. 75.

⁴ See Lattan v. Royal Ins. Co., 45 N. J. L. 453; Baltis v. Dobin, 67 Barb. (N. Y.) 507; Reid v. McCrum, 91 N. Y. 412; Martin v. Tradesman's Ins. Co., 101 N. Y. 498; Brown v. Hart. Ins. Co., 21 L. Rep. 726 (D. Mass.).

⁵ Powles v. Innes, 11 M. & W. 10; Godin v. Lond. Assur. Co., 1 Burr. 469; Lond. Investment Co. v. Montefiore, 9 L. T. 688; Bergsen v. Builders' Ins. Co., 38 Cal. 541; Garland v. Ins. Co. of N. A., 9 Brad. (Ill.) 571; Simeral v. Dubuque Mut. F. Ins. Co., 18 Iowa, 319; Carroll v. Bost. M. Ins. Co., 8 Mass. 515; Jecko v. St. Louis F. & M. Ins. Co., 7 Mo. Ap. 308; Ætna F. Ins.

may be made to bearer, as in *Ellicott v. U. S. Ins. Co.*,¹ where the company, on receiving the deposit of certain securities, guaranteed by a sealed policy to pay the bearer thereof a certain sum on a certain day, which was held to be a policy to bearer, and the holder, whether the original insured or not, is *prima facie* entitled to the money. It was stated in *O'Connor v. Imperial Ins. Co.*,² in Lower Canada, however, by art. 2576 of the Civil Code, that the insured has in all cases the right to assign the policy with the property.

264. A policy may be assigned on a transfer of the subject-matter if the underwriter assent, and this is usually provided for in the policy, which stipulates its being done in a particular way which must be followed. The proviso that the policy was to "be void in case of its being assigned . . . without the previous consent in writing of the insurers," precludes evidence of a verbal assent.³ But any method of assent which the insurer leads the insured to consider sufficient is all that is required,⁴ though in this proposition is often involved some question of waiver. Where the policy provided for the method of assent, but the policy was indorsed "For value received pay the within, in case of loss, to" the purchaser, which indorsement was made a year after the sale, it was held, as it was doubtful whether this was intended as an order to receive the money or an assignment, that evidence was admissible to show the real intent of the insurers, and whether, under the circumstances, the insurers had assented to it as an assignment of the policy.⁵ In *Manley v. Ins. Co. of N. A.*,⁶ a vendee in possession under contract of sale insured and, after a partial loss, directed the insurer to pay the loss to the vendor, assigning to him the policy, but the company declined its consent because it covered the part

Co. v. Tyler, 16 Wend. (N. Y.) 385;

Wyman v. Prosser, 36 Barb. (N. Y.)

368; *Lett v. Guardian F. Ins. Co.*, 125

N. Y. 82; *People v. Beigler, H. & D.*

Lalor Sup. (N. Y.) 133; *Quarles v.*

Clayton, 87 Tenn. 308; *Sabotta v. St.*

Paul F. & M. Ins. Co., 54 Wis. 687;

Carpenter v. Providence Was. Ins. Co.,

16 Peters, 495; *Bank v. North Brit. &*

Mer. Co., 3 New S. Wales L. 60. See

ante, §§ 2, 202.

¹ 8 G. & J. (Md.) 166.

² 14 L. Can. J. 219.

³ *Minturn v. Mfrs. Ins. Co.*, 10 Gray (Mass.), 501.

⁴ See *Shearman v. Niag. F. Ins. Co.*,

² *Sweeney* (N. Y.), 470; *McQueen v.*

Phoenix Mut. Ins. Co., 3 L. N. (Can.)

336.

⁵ *Fogg v. Middlesex Mut. F. Ins. Co.*,

10 Cnsh. (Mass.) 337.

⁶ 1 Lans. (N. Y.) 20.

destroyed as well as the residue. It was then amended to meet the insurer's objection, and the agent indorsed the insurer's consent, and it was held the company was bound even if the clause as to assignments required the company's consent to precede the assignment. Under the clause that a mortgagee might have the policy assigned to him on his signing a premium note or giving security for its payment, but that the policy was to be forfeited unless the insurer give his written consent, the issue of the policy on the application stating there was a mortgage and that the insured "wished to assign," cannot be construed as a written consent to an assignment.¹ Where the clause ran "unless notice thereof be immediately given . . . and the assignment approved," notice alone is apparently not sufficient, but there must be an approval.² That is, the company need not actively disapprove, but the insurance cannot be transferred unless it actively approve.³ Therefore notice and the company's silence may not be sufficient.⁴

A clause against alienation without consent, and a clause that "assignment of the policies must be made within ten days after the sale of the property," were held to mean that the company need not assent to the assignment unless it has assented to the sale.⁵ But the insurer may indorse his assent after the sale, though the clause provides in case of a transfer of the property without the company's consent, that the policy should be void.⁶ But where there is a clause against alienation, without the insurer's consent after notice and an assignment made of the policy in sixty days therefrom, it was held the sixty days must be computed from the alienation before the loss, for it would be useless to give notice and ask for assent after the loss.⁷

265. On an assignment of the policy the particular interest need not be stated unless requested; the request for an assignment is in itself notice that some interest is intended, as otherwise the assign-

¹ *Smith v. Saratoga Co. Mut. F. Ins. Co.*, 3 Hill (N. Y.), 508.

² *Girard F. & M. Ins. Co. v. Hebard*, 95 Pa. St. 45. See also *Gould v. Patton's Androscoggin Mut. F. Ins. Co.*, 76 Me. 298; *Corse v. Brit.-Am. Ins. Co.*, 1 Rev. Crit. (Can.) 243.

³ *Id.*

⁴ *Girard F. & M. Ins. Co. v. Hebard*, 95 Pa. St. 45.

⁵ *Home Ins. Co. v. Lindsae*, 26 Oh. St. 348.

⁶ *Gilliat v. Pawtucket Mut. F. Ins. Co.*, 8 R. I. 282.

⁷ *Dadmun Manfg. Co. v. Worcester Mut. F. Ins. Co.*, 11 Met. (Mass.) 429.

ment would be nugatory, and if the company desired more precise knowledge they should ask for it.¹ A general assignment for creditors was held in New Hampshire to include fire policies, and to avoid under a clause against assignment.² Though a contrary rule was held in the Supreme Court of New York.³ The fact that the assignee happens to have been also the payee in the policy has been held immaterial.⁴ Though it has been held in Minnesota that a future assignment as security for an increased debt, to one who was already payee to the extent of the claim, is ineffectual, and, therefore, will not avoid.⁵

266. A verbal agreement by a vendor to hold the money for the vendee is not an assignment within the clause against assignment.⁶ Nor is a pledge of a fire policy an assignment within the clause against assignments.⁷ Where the policy was to be void "unless legally assigned," it was held this meant validly and effectually; and that an equitable charge by way of a mere deposit came within the exception, and notice to the company was unnecessary.⁸ And where there was a clause against the pledge of the policy, and the secretary wrote on it, in case of loss to pay to A., with whom the insured left the policy as he was to go on a voyage, but on his return expecting to get the policy again, A. on a loss being empowered to deduct the money advanced, it was held not a pledge, but a mere order to collect.⁹

267. In mutual companies it is often provided that the assignee of a fire policy besides notice shall assume the premium note of the assignor and give security for its payment, which must be done before he can become legally the assignee of the policy.¹⁰ But a charter provision that the assignee of the policy shall give satisfactory security on an assignment for the residue of the premium

¹ Hooper v. Hudson River F. Ins. Co., 7 N. Y. 424.

⁶ Wash. F. Ins. Co. v. Kelly, 32 Md. 421.

² Dube v. Mascoma Mut. F. Ins. Co., 64 N. H. 527.

⁷ Mahr v. Bartlett, 53 Hun (N. Y.), 388.

³ People v. Beigler, H. & D. Lalor, (N. Y.), 133.

⁸ Dufaur v. Professional L. Assur. Co., 25 Beav. 599.

⁴ Newman v. Springfield F. & M. Ins. Co., 17 Minn. 122. See also Brockway v. Conn. Mut. L. Ins. Co., 29 Fed. R. 766 (W. D. Pa.).

⁹ Russ v. Waldo Mut. Ins. Co., 52 Me. 187.

¹⁰ Willey v. Mut. F. Ins. Co., 2 Dorion (Quebec), 29.

⁵ Newman v. Springfield F. & M. Ins. Co., 17 Minn. 122.

note, does not necessitate his own note; the note of the assignor, if that is satisfactory, may be left as security.¹ Where the policy provided that on an alienation the insured should surrender his note, and that the grantee on an assignment of the policy could have it confirmed to him on giving security and undertaking the grantor's liabilities; and the assignee did give a new note and undertook the liabilities of the assignor as required, and reassigned the policy with the property to the grantor, as collateral, the company retaining both notes, it was held that the grantor was not liable on his note, as evidently the intention was to hold the assignee liable, who was the member and to whom the policy had been confirmed on giving his note, and his subsequent assignment merely as collateral was not material.² The proviso in the policy "that the grantee or alienee, having the policy assigned to him, may have the same ratified and confirmed to him . . . upon application to the directors and with their consent, within thirty days next after such alienation on giving proper security, etc., and by such certification and confirmation the party causing the same shall be entitled to all the rights and privileges, and subject to all the liabilities" of the grantor, was held to be compulsory, and that the directors must confirm a policy assigned to a grantee who had duly applied and who was unobjectionable.³

No doubt a guardian, on an alienation of his ward's property, could assign the policy, with the insurer's assent, to the alienee.⁴

268. A life contract being merely the right to receive a sum of money on the happening of a contingency, in which the character of the life rather than that of the insured is the principal factor, in the company's exercise of caution in forming the contract there is not necessarily any *dilectus personæ*, and unless there is a special proviso in the contract against it, it may be assigned without restriction.⁵ It may also be pledged,⁶ or mortgaged,⁷ or disposed of at

¹ *Durav. v. Hudson Co. Mut. Ins. Co.*, 4 Zab. (N. J.) 171.

² *Miner v. Judson*, 2 Lans. (N. Y.) 300.

³ *Boynton v. Farmers' Mut. F. Ins. Co.*, 43 Vt. 256.

⁴ *Cummings v. Hildreth*, 117 Mass. 309.

⁵ *Fitzpatrick v. Hart. L. & Annuity Ins. Co.*, 56 Conn. 116; *Pomeroy v. Manhattan L. Ins. Co.*, 40 Ill. 398.

⁶ *Martin v. Stubbings*, 126 Ill. 387, *Macauley v. Cent. Nat. Bank*, 27 S. C. 215.

⁷ *Ottley v. Gray*, 16 L. J. Ch. n. s. 512; *Dungan v. Mut. Benef. L. Ins. Co.*, 46 Md. 469.

auction.¹ It may be the subject of a gift *inter vivos*,² or a *donatio causa mortis*,³ or the subject of a bequest to an individual or to a charity.⁴ The clause, "this policy can be assigned only upon the written approval of the company," but not providing for a forfeiture, has been held not to forfeit on an assignment of a life policy without notice.⁵ In Massachusetts the clause "if assigned, notice is to be given the company," was stated only to affect the right of the assignee to enforce his right in his own name.⁶ So in Tennessee the clause, "if assigned, notice is to be given to the company," was held not to affect the assignee's right to recover as between the insurer and assignee.⁷ And it was held in Alabama that a policy on the life of a debtor of a firm, for the firm's benefit, might be transferred by one partner to the other as part of his firm interest, particularly when by the death of the surviving partner the legal title is cast on the assignee, though there was a clause against assignment without the insurer's assent.⁸

269. In Maryland, where no particular time is specified within which notice of the assignment is to be given to the company, two days, though after the death of the insured, is sufficient.⁹ In *Sander's Case*,¹⁰ the articles of association provided that no transferee of a policy should be entitled to be registered as a member of the company until he shall have furnished to the directors such evidence as they shall require of the transfer, etc., and under the articles "the holders of participating policies duly registered," having paid a premium, were to be deemed members. The directors had power to require evidence of an assignment before the registration of assignees as members, and there had been an assignment of the policy,

Succession of Hearing, 26 La. An. 326;
Palmer v. Merrill, 6 Cush. (Mass.) 282;
Mut. L. Ins. Co. v. Allen, 138 Mass.
 24; *Marcus v. St. Louis Mut. L. Ins.*
Co., 68 N.Y. 625; *Eckel v. Renner*, 41
 Oh. St. 232; *Mut. Proteo. Ins. Co. v.*
Hamilton, 5 Sneed (Tenn.), 269; *Bur-*
singer v. Bank, 67 Wis. 75; *N.Y. Mut.*
L. Ins. Co. v. Armstrong, 117 U. S.
 591.

¹ *Barber v. Morris*, 1 M. & Rob. 62.

² *Re Estate of Swan*, 14 Ins. L. J.
 395 (Ill.); *Madeira's Ap.* 4 Atlan. R.
 90S (Pa.).

³ *Witt v. Amiss*, 1 B. & S. 109.

⁴ *Bunyan on Insurance*, 318.

⁵ *Marcus v. St. Louis Mut. L. Ins. Co.*,
 68 N. Y. 625.

⁶ *Mut. L. Ins. Co. v. Allen*, 138 Mass.
 24.

⁷ *Mut. Protec. Ins. Co. v. Hamilton*,
 5 Sneed (Tenn.), 269.

⁸ *Piedmont & Arlington L. Ins. Co.*
v. Young, 58 Ala. 476.

⁹ *Price v. Knights of Honor*, 68 Tex.
 361.

¹⁰ 20 Ch. D. 403.

and the assignee had paid a premium, but the directors had not required, nor the assignee demanded, to show evidence of it, and the name of the assignee had not been entered on the list, and it was held the assignee was not a member.

270. Where the policy requires the "company" or the "directors" to assent to an assignment, the assent of the secretary has been held sufficient where he was apparently authorized as the former's agent to do so.¹ Where the assent given by an agent is relied on, his authority to assent must appear. It has been held the assent of the general agent in the habit of assenting in behalf of the insurer, is sufficient, though the consent of the "association" or of the "company" was required.² The consent by the agent "for the secretary," the agent informing the secretary next day, and being accustomed to approve, was held sufficient.³ The assent of the local or soliciting agent to an assignment is in general not sufficient.⁴ But if the insurer holds out an agent as armed with general powers it is different, for the insured is not affected with his secret limitations.⁵ Where a former agent, whose authority had been revoked, had indorsed a memorandum on the policy: "This to enure to the benefit of" the assignee, which the secretary of the company, on viewing, said was all right, it was held the company was bound.⁶ And where the assent is indorsed by "A., agent," who had issued the policy while agent, but assented, while only subagent, when authorized by the general agent, the assent was held to bind, the insured not knowing of the change.⁷ The authority of an agent to assent to "transfers and assignments" has been held to mean the ordinary assignments on an alienation, etc., but not to include the approving of assignments of the indebtedness arising from a loss of the property insured.⁸ And the authority

¹ See *New Eng. M. Ins. Co. v. De Wolf*, 8 Pick. (Mass.) 56; *Duray v. Hudson Co. Mut. Ins. Co.*, 4 Zab. (N. J.) 171; *Buchanan v. Exchange F. Ins. Co.*, 61 N. Y. 26. *Cit. Mut. F. Ins. Co.*, 13 Gray (Mass.), 79; *Lynde v. Newark F. Ins. Co.*, 139 Mass. 57; *Stringham v. St. Nicholas Ins. Co.*, 3 Keyes (N. Y.), 280.

² *New Orleans Ins. Co. v. Holberg*, 64 Miss. 51; *F. Ins. Ass'n v. Miller*, 2 Wil. (Tex.) § 333. ⁵ *Miller v. Phoenix Ins. Co.*, 27 Iowa, 203; *Breckenridge v. Amer. Cent. Ins. Co.*, 87 Mo. 62.

³ *Farmers' Mut. Ins. Co. v. Taylor*, 73 Pa. St. 342. ⁶ *Buchanan v. Exchange Ins. Co.*, 61 N. Y. 26.

⁴ 50 Ind. 209; *Strickland v. Council Bluffs Ins. Co.*, 66 Iowa, 466; *Tate v.* ⁷ *Chauncey v. Ger. Amer. Ins. Co.*, 60 N. H. 428.

⁸ *Weed v. Bontelle*, 56 Vt. 570.

of the insurance commissioner to accept, on behalf of the company, service of legal process, would not empower him to accept notice of a transfer of the policy money due on a loss.¹ On the question of the agent's powers, it was held in New York that the secretary could not testify on behalf of the company as to the agent's authority, when there was a written power of attorney under which the agent acted, or a directors' resolution authorizing him to act, as these were the proper evidence.²

271. As between the assignor and assignee no particular form is essential to constitute a valid assignment.³ It may be made to more than one jointly,⁴ or first to one and subsequently to others, subject to the rights of the prior assignees.⁵ But there must appear an intention to assign, accompanied by a delivery either symbolical or physical;⁶ for the policy being only the evidence of the debt, the money may be assigned without it, and, therefore, its mere possession is not sufficient to give an absolute title to the fund.⁷ The assignment was held complete when the creditor was directed to pay himself, and pay balance to the insured's heirs, "or order," though no order was endorsed.⁸ An order endorsed on a policy to pay the whole amount thereon is a valid assignment without an acceptance.⁹ In *Griswold v. Amer. Cent. Ins. Co.*,¹⁰ a policy payable to B., taken by A., who was indebted to B., on A.'s property, which A. sold to C. with notice to the company, causing a memorandum to be placed on the policy register stating the transfer of the policy to C., was held an assignment to C. subject to B.'s claim. In *Swift v. R'way Pass., Etc., Ass'n.*,¹¹ the insured, not being able to pay assessments, gave a life policy to his wife, making it read for

¹ *Weed, Etc. Co., v. Boutelle*, 56 Vt. 570.

² *Beninghoff v. Agricult. Ins. Co.*, 93 N. Y. 495.

³ *Gore v. Council Bluffs Ins. Co.*, 67 Iowa, 272; *Sherman v. Fair*, 2 Spear (S. C.), 647; *Row v. Dawson*, 1 Ves. Sr. 331.

⁴ *Speck v. Hettinger*, 4 Atlan. R. 168 (Pa.). See also *Mercant. Ins. Co. v. Halthaus*, 43 Mich. 423.

⁵ *Diffenbach v. Manhattan L. Ins. Co.*, 61 Md. 370.

⁶ See *Lee v. Abdy*, 17 Q. B. D. 309; *Dexter Sav. Bank v. Copeland*, 77 Me. 263.

⁷ *Rummens v. Hare*, 1 Exch. D. 169; *Wood v. Phoenix Mut. L. Ins. Co.*, 22 La. An. 617; *Langdon v. Minn. Farmers' Mut. F. Ins. Co.*, 22 Minn. 193.

⁸ *Johnson v. Alexander*, 125 Ind. 575.

⁹ *Hall v. Dorchester Mut. F. Ins. Co.*, 111 Mass. 53. See *Bushnell v. Bushnell*, 92 Ind. 503.

¹⁰ 1 Mo. Ap. 97.

¹¹ 96 Ill. 309.

her benefit in the event of his death, writing "this makes the policy yours if you will keep it," which she did, and it was held this passed the money on his death to his wife. Where a debtor took out a life policy, with a condition that, if it should be *bond fide* assigned, the assignee should have the benefit of it up to his debt, notwithstanding that the insured should commit suicide, and the insured deposited the policy with his creditor with a letter, promising to assign it when requested, and without notice to the insurer, and the insured did commit suicide, it was held a valid assignment in equity, and effectual against the insurer.¹ An assignment of a life policy under seal has been held to import a consideration, and, therefore, to prevail against a mere denial of the consideration, unsupported by proof.² A voluntary assignment with an irrevocable power of attorney has been held binding.³

272. The assignment need not be evidenced by a writing, but a verbal assignment accompanied by delivery is sufficient.⁴ In Missouri a parol assignment by a husband to his wife of a policy is good against creditors.⁵ Money due on a policy and on a banker's deposit note was held to pass as a *donatio causa mortis* by the delivery of the policy and note.⁶ A policy verbally assigned and delivered to assignee is not within Statute of Frauds of California.⁷ But in England, in *Howes v. Prudential Assur. Co.*,⁸ the handing a policy to his wife by the insured, and giving it to her provided she keep it up, was held an insufficient assignment, as it was not a chattel and could not legally be assigned in that way. Nor will the mere deposit of a policy without a word said or notice to the office, create an assignment, though it may create a lien.⁹ Nor will the

¹ *Cook v. Black*, 1 Hare, 390. See *post*, § 494.

² *Mut. Protec'n Ins. Co. v. Hamilton*, 5 Sneed (Tenn.), 269.

³ *Pearson v. Amicable Assur. Office*, 27 Beav. 229. See *Macauley v. Cent. Nat. Bank*, 27 S. C. 215.

⁴ See *Chapman v. McIlwrath*, 77 Mo. 38; *Thompson v. Emery*, 27 N. H. 269; *Brown v. Mansus*, 5 Atlan. R. 768 (N. H.); *Leinkauf v. Calman*, 110 N. Y. 50; *Marcus v. St. Louis Mut. L. Ins. Co.*, 68 N. Y. 625; *Malone's Est.*, 9 Ins. L. J. 767 (Pa.); *Charleston Ins.*

& Trust Co. v. Neve, 2 McM. (S. C.) 237; *Manning v. Bowman*, 3 Nov. Scot. Dec. 42; *Jones v. Gibbons*, 9 Ves. 407.

See *Shaak v. Meilly*, 136 Pa. St. 161.

⁵ *Chapman v. McIlwrath*, 77 Mo. 38.

⁶ *Amiss v. Witt*, 33 Beav. 619.

⁷ *Bibend v. Liv. & Lond. & Globe F. & L. Ins. Co.*, 30 Cal. 78.

⁸ 49 L. T. n. s., 133. See also *Ward v. Audland*, 8 Beav. 201; *Fortescue v. Barnett*, 3 M. & K. 36. See *ex parte Kensington*, 2 Ves. & B. 79; *Ferris v. Mullins*, 2 Sm. & G. 370.

⁹ *Gibson v. Overbury*, 7 M. & W. 555.

placing the policy in the hands of an attorney for collection, with directions to apply the proceeds to pay a debt to a third party, constitute an assignment to such third party.¹ In Scotland, in *United Kingdom L. Assur. Co. v. Dixon*,² it was held that a mere transmission of a life policy and offer to assign, unperformed, and without notice given to company, would not give rights in it to a custodian debtor in preference to an administratrix. In *Crossley v. City of Glasgow L. Assur. Co.*,³ A. informing the company that he insured to secure B., deposited the policy with C., asking the latter to instruct a solicitor to prepare an assignment, which C. never did, and A. died insolvent, leaving a will, but no representation was ever taken out. C. then notified the company of his possession of the policy, which the company acknowledged in the terms of the Policies of Assurance Act, 1867, sec. 6, and subsequently notified C. of its assent to pay on receiving a receipt from the representatives of A., and it was held there had been no equitable assignment within the Act, and the company was justified in its refusal.

In *Williams Ap.*,⁴ A., who was about to leave home, purchased an accident ticket and laid it on a table at which his wife was sitting, saying, "Take it; take care of it, and if I get killed before I get back, you would be that much better off." Held insufficient to establish a gift against creditors of his estate.

In *Malone's Est.*,⁵ before marriage the husband, while solvent, took out a policy on his life and kept it in his firm's safe. He became embarrassed and his creditors, through his representation as to ownership, granted an extension. After his death his wife claimed it, saying he had given it to her; held, a valid gift, as the intention to transfer, without written evidence, is enough to transfer a chose in action; it may be made by mere delivery and proved by husband's declarations; and the husband may become subsequent custodian of it.

In *Williams v. Guile*,⁶ the deceased delivered a duplicate bill of sale with a policy to the defendant's attorney, reserving therein the right to revoke the assignment, directing the attorney to put the papers "in the safe for Mrs. Guile (the defendant); it was hers,

¹ *Aultman v. McConnell*, 34 Fed. R. 724 (S. D. Iowa).

² 16 C. S. C. (1st Ser.) 1277.

³ 4 Ch. D. 421.

⁴ 106 Pa. St. 116.

⁵ 9 Ins. L. J. 767 (Pa.).

⁶ 46 Hun (N. Y.), 645.

and if anything happened to him to give it to her." The papers were put in the safe, and on the decease of the insured delivered. Held a valid assignment.

In *Crittenden v. Phoenix Mut. L. Ins. Co.*,¹ where a father had given a policy to his son, who returned it to be altered for the son's wife; which was done by the company, and the day it was redelivered to the father the son died. Held the gift was complete.

In *Crozier v. Phoenix Ins. Co.*,² it was held that an assignment of a sealed policy cannot be had by an instrument not under seal.

It was held in Maryland that delivery to an attorney for the insured of an assignment was a sufficient delivery under the Maryland Act.³

273. A physical delivery is not essential if there is a symbolical delivery.⁴ Thus in *Fortescue v. Barnett*,⁵ a voluntary assignment by deed by the grantor of a policy on his own life to trustees for the benefit of his sister and children, if they should outlive him, the grantor retaining the policy without notice to the insurer, was held a completed gift, as no act remained to be done by the grantor. So a written assignment of the policy with notice to the company after a loss, the insured retaining the policy, was held to prevail against a subsequent garnishment.⁶ So it has been held that a letter to A., charging the policy with a floating balance due him, and made three years before the insured's suicide, was within the exception as to an assignment for a valuable consideration six months before his death.⁷ But a letter from the insured to the agent of a company, which letter was communicated to the company, authorizing him to retain the proceeds due on a policy for a particular creditor, the policy being retained by the insured and the letter being not acted on, was held not to create an equitable assignment or lien in favor of the creditor; it could not be regarded as a power of attorney coupled with an interest, as the policy was retained by the insured, and the conclusion of the letter showed it to be of an

¹ 41 Mich. 442.

² *Crozier v. Phoenix Ins. Co.*, 2 Han. (N. B.) 199.

³ *N. Y. L. Ins. Co. v. Flack*, 3 Md. 341. See also *Marous v. St. Louis Mut. L. Ins. Co.*, 68 N. Y. 625.

⁴ *Spring v. S. C. Ins. Co.*, 8 Wheat. 268.

⁵ 3 M. & K. 36. See *Weston v.*

Richardson, 47 L. T. n. s. 514; *Sewell v. King*, 14 Ch. D. 179.

⁶ *Aultman v. McConnell*, 34 Fed. R. 724 (S. D. Iowa).

⁷ *Jones v. Consolidated Investment Assur. Co.*, 26 Beav. 256.

executory nature.¹ In *Scott v. Dickson*,² where one insured his life evidently for another and made an invalid assignment to him, without delivery of the policy, the imperfect assignment was held an order to pay the beneficiary. But in *Lazarus v. Commonwealth Ins. Co.*,³ where there was a clause against a pledge or transfer of policy without the consent of the company, a general assignment, including "all policies," was held not to pass a policy already in the hands of an agent who had a lien on it. So in *Kitts v. Massasoit Ins. Co.*,⁴ where one partner sold all his interest in the firm, but did not assign, transfer, or deliver the policy on the firm property to the buyer, it was held, though the words were broad enough to carry all choses in action yet as the evident intent was not to pass the policy, it would not pass, as not being intended. But a verbal agreement that the insured should hold policy for the vendees is not an assignment of the policy.⁵ In *Palmer v. Merrill*,⁶ the assignment on a life insurance for value, by indorsement on the policy for part of the sum insured with notice to the insurer, the policy being retained by the insured, was held not to transfer such an interest, where the estate proves insolvent, as to entitle the assignee to recover the whole sum assigned. An assignee must accept the assignment,⁷ but delivery to the attorney of the assignee has been held sufficient acceptance under the Maryland Statute.⁸

274. In England⁹ and the United States¹⁰ a life policy passes to the assignee in bankruptcy. Where on the formation of a partnership it had been agreed that the trade utensils, etc., should be the separate estate of A., and that B. should pay a *pro rata* rent therefor, it was held on a loss, before a commission issued against A. & B., that the Act of James contemplated a visible possession up to bankruptcy, but as this was gone on the fire, the insurance money was the separate estate of A.¹¹ The assignee is entitled to a life

¹ *Re Foster*, 7 Ir. R. Eq. 294.

² 108 Pa. St. 6.

³ 5 Pick. (Mass.) 76.

⁴ 56 Barb. (N. Y.) 177. See also *Hurlburt v. Hurlburt*, 49 Hun (N. Y.), 189.

⁵ *Wash. F. Ins. Co. v. Kelly*, 32 Md. 421.

⁶ 6 Cush. (Mass.) 282.

⁷ *Crozier v. Phoenix Ins. Co.*, 2 Han. (N. B.) 199.

⁸ *N. Y. L. Ins. Co. v. Flack*, 3 Md. 341.

⁹ *Jackson v. Forster*, 1 E. & B. 469; *Schondler v. Wace*, 1 Camp. 487.

¹⁰ *Bassett v. Parsons*, 140 Mass. 169; *Belt v. Brooklyn L. Ins. Co.*, 12 Mo. Ap. 100; *Re McKinney*, 15 Fed. R. 535 (S. D. N. Y.).

¹¹ *Re Smith*, 3 Mad. Ch. 63.

policy effected by the insolvent to secure a debt which has been paid, which was mentioned in the schedule, as it is obviously a debtor's¹ policy. On an appointment to his executors by the insured in 1821, under a post-nuptial settlement, in which policies on his life were settled in trust for his wife, and after her death upon trust to his appointees, and in default of appointment for his children, the policies were sold under an order and the proceeds invested to accumulate during the joint lives of the husband and wife. In 1828 A. took the benefit of the Insolvent Debtor's Act, and in 1845 became bankrupt, and in 1847 the wife died. Held, that by the appointment the policy moneys became part of the general estate of A.²

275. Where in pursuance of a settlement the husband insured in the names of trustees, and additions thereto were made by the company as a bonus or profits, on bankruptcy and death the trustees were not entitled to the added sums.³ A policy taken out under the Woman's Property Act of 1870,⁴ for her sole and separate use if she survived, but to the husband if he survived, whether he or she keep the policy on foot, the money goes to her, as the Act has modified the Bankrupt Act.⁵ A policy kept up by the wife out of her separate estate, payable to her husband at its termination, is not such an asset as the assignee at the date of the bankruptcy is entitled to, and on her death after the assignment, but before the discharge, the assignee will not take.⁶ A policy, payable in London, was taken in 1876 through the London agency of a New York company, by a man domiciled in England, for the sole use of his wife, which was in conformity with the New York statute, by virtue of which it enured to her sole use, though on certain contingencies the creditors could get a certain proportion of the money. The policy provided that in ten years from its issue the legal owner had the option to withdraw its value, and the husband paid till 1883, when he became bankrupt, though he was discharged the next year. After 1883 the wife kept up the policy out of her estate, and in 1886 the company paid the wife on the exercise of this option. It was held the option was hers and not her husband's, as she was admitted to be the legal owner of the policy; and, therefore, as she

¹ *Storie's Trusts*, 1 Gif. 94.

⁴ 33 & 34 Vict., c. 93.

² *Mackenzie v. Mackenzie*, 21 L. J. Ch. 465.

⁵ *Holt v. Everall*, 2 Ch. D. 266.

³ *Parkes v. Bott*, 8 L. J. Ch. n. s. 14.

⁶ *Re Owen*, 8 N. B. Reg. 6 (D. Mo.).

might not exercise it in her husband's lifetime, it was a mere possibility in his favor, and the trustee in the bankruptcy proceedings did not take. The Court also thought that the provision as to creditors, and reference to the American Statute in the policy, were not intended to incorporate provisions that would only apply to New York creditors, for the Statute could not regulate the English bankruptcy procedure, and therefore the American statute was only meant to show how the money was to go when paid to her, but not to vary the insurer's right to pay her.¹

276. The English Bankruptcy Acts of 1869 and 1883, so far as the author is aware, have not been extended to Ireland, and the law as to the order and disposition is, therefore, not the same as in England.²

Where in the United States a policy passed to the bankrupt's assignee, who did not get its surrender value which was all the interest belonging to him in the policy, and the bankrupt was discharged, and his wife kept it up supposing it was for her, it was held the assignee must surrender it on payment to him of the full net reserve, or value at the time of the bankruptcy.³ Though in *Re Learmouth*,⁴ where a bankrupt, after his bankruptcy, kept up the premiums on certain policies he had mortgaged prior to his bankruptcy, which he had covenanted to do, but which his assignees had disclaimed, and the bankrupt had paid, as agreed, a certain sum toward the liquidation of his debt, it was held that the assignee did not take the policy money. A life policy omitted from the schedule will go to the trustees in bankruptcy; and where the insurer pays on the death of the bankrupt the policy money to one to whom the bankrupt had secretly assigned it, the trustees in bankruptcy can recover it, less the premiums paid to keep it up.⁵ But money paid on an invalid policy which has been assigned by the bankrupt could not be recovered by the trustee in bankruptcy *in trover*, though a suit might lie for the parchment's value.⁶

277. On the insurer's suicide, after his bankruptcy, at Valparaiso where he was domiciled, which by operation of law was a

¹ *Ex parte Dever*, 18 Q. B. D. 660.

⁴ 14 W. R. 628.

² *Re Russell*, 1 Cr. & D. (Ir.) 27;
Re Armstrong, 1 Ib. 37.

⁵ See *Schondler v. Wace*, 1 Camp, 487; *Re Smith*, 12 W. R. 534.

³ *Re Kinney*, 15 Fed. R. 535 (S. D. N. Y.).

⁶ *Wills v. Wells*, 8 Taunt. 264.

"*cessio bonorum*," it was held the assignees in bankruptcy were not third parties having an interest by assignment for a valuable consideration, within the policy's exception that if the insured committed suicide the policy was to be void, except so far as a "third party had acquired a *bonâ fide* interest by assignment therein or by legal or equitable lien for a valuable consideration or as security for money."¹ A life policy was held "a thing in action" under the English Bankruptcy Act of 1869,² and excepted from the operation of the reputed ownership clause, which ran "things in action, other than debts due . . . in the course of trade and business, shall not be deemed goods and chattels within the meaning of this clause."³ A covenant to pay recurring premiums on a life policy is an absolute covenant; it is an agreement to pay until a certain event, and is not a liability to pay on a contingency within 12 & 13 Vic., c. 106, sec. 173, for the contingency does not create, but ends the liability.⁴

278. A testator, who had three policies on his life aggregating £2500, payable to his wife, bequeathed to her £5000 "to be paid to her as far as can be out of the insurance moneys coming to my estate from the insurance on my life;" and it was held the amount received from the policies must be credited on the legacies of £5000, though the policies were payable to her.⁵ Where a policy for £3000 on A.'s life was assigned by deed to B. with the right to will it, who, after reciting the trusts, willed £1000 to A. and the remaining £2000 to C., and the company paid £9000 under the policy, the whole was held to pass, as subject to the trusts, in the proportion of 1 to 2 to A. and C.⁶ In Scotland where there was a trust created for the management of the settler's estates for life, includ-

¹ *Jackson v. Forster*, 1 E. & E. 463. See *ante*, § 271; *post*, § 494.

² Section 13, subs. 5.

³ *Ex parte Ibbetson*, 8 Ch. D., 519.

⁴ *Mitcalfe v. Hanson*, 1 Eng. & Ir. Ap. 242. 12 & 15 Vict., c. 105, section 173, reads: "If any trader, who shall have become bankrupt after the commencement of this Act, shall have contracted . . . a liability to pay money upon a contingency which shall not have happened, and the

demand in respect thereof shall not have been ascertained . . . the person with whom such liability has been contracted shall be admitted to claim for such sum as the Court shall think fit, and after the contingency shall have happened, and the demand in respect of such liability shall have been ascertained, he shall be admitted to prove such demand, etc."

⁵ *Fort v. Edwards*, 32 N. J. Eq. 641.

⁶ *Courtney v. Ferrers*, 1 Sim. 137.

ing the payment of debts, sale of land, &c., the proceeds of the policy by the settler on the life of his son and heir, on his son's death, were invested in heritable security, which was held heritable and not to form part of the executory estate in a question as to legitim.¹ In Alabama, a policy by the husband on his life to his wife, as sole beneficiary, not including by its terms the husband's marital rights, vests in her by the statute; and such a policy, having been kept alive during her husband's life, and she having been paid from it an excess over her dower, she will be debarred under the statute of her dower.² In Maine it was held a general bequest, which may come from any part of estate as well as from insurance money, will not imply an intention to dispose of insurance money which was made payable to legal representatives; for the legislature provides that this fund shall not constitute payment for debts, etc., but shall go to his widow and issue; and to overcome the idea of the statute in any event he must specifically designate this fund.³ A will by the wife of "all her interest in the community property" does not, in Texas, pass a policy by husband payable to the wife.⁴ In England, under a bequest of "any money that the testator might die possessed of, or which might be due or owing at his decease," passed the moneys paid on a life policy.⁵ And a general life policy on the debtor will pass in a will under "debentures," or being merely securities for debts under words "debts due testator."⁶

279. Policies of insurance, in which the directors engage "to pay out of the funds," or "that the funds shall be liable," or "that a share of the funds shall be paid," are not so connected with land under the Mortmain Act as to render void a gift to a charity, though the assets of the company only consist of realty.⁷ A direction in a will to pay out of the testator's property premiums on a policy effected by him on the life of another, is valid for the whole life insured, and is not restricted to twenty years under the Thelluson Act,⁸ as an accumulation.⁹

¹ *Pringle's Trustees v. Hamilton*, 10 C. S. C. (3d Ser.) 621.

² *Williams v. Ib.*, 68 Ala. 405.

³ *Blouin v. Phaneuf*, 81 Me. 176. But see *Fox v. Senter*, 83 Me. 295.

⁴ *Evans v. Opperman*, 76 Tex. 293.

⁵ *Petty v. Wilson*, 4 Ch. Ap. 574.

⁶ *Phillips v. Eastwood, Lloyd & G.* (T. Sug.) 270.

⁷ *March v. Atty.-General*, 5 Beav. 433.

⁸ *Bassil v. Lister*, 9 Hare, 177.

⁹ 39 & 40 Geo. III., 111, c. 98.

280. The consent of the company to a valid assignment of a fire policy is only necessary before a loss has taken place, for after the loss has occurred there is no longer any *dilectus personæ*, but the contract of indemnity becomes analogous to a promise to pay a debt, which, like any other chose in action, the insured may assign to a stranger, even though there be a clause in the policy against its assignment, for it is not an assignment of the contingent guarantee, but of the debt.¹ A clause in a contract of carriage that the carrier shall have benefit of the insurance is not within a clause of the policy "that the insurance shall be void if the policy or the interest insured therein shall be sold, assigned, transferred, or pledged, without the consent, in writing, of the insurer."² And a deed of assignment made before a fire, but not delivered till after it, is not within a clause against assignment before loss.³ A clause against assignment, either prior or subsequent to the loss, was in Tennessee held not to apply to the assignment of a demand against the company after the loss has occurred.⁴ In Iowa the condition that on an assignment before or after the loss, without consent, the "insured" shall not recover, was held not to prevent an "assignee" of the insured who had brought the action, as is allowed in that State,

¹ *Commer. F. Ins. Co. v. Capital City Ins. Co.*, 81 Ala. 320; *Daniels v. Meinhard*, 53 Ga. 359; *Carter v. Humboldt F. Ins. Co.*, 12 Iowa, 287; *Phillips v. Merrimack Mut. F. Ins. Co.*, 10 Cush. (Mass.) 350; *Dadmun Mfg. Co. v. Worcester Mut. F. Ins. Co.*, 11 Met. (Mass.) 429; *Mo. Val. L. Ins. Co. v. Kelso*, 16 Kan. 481; *Manhattan Ins. Co. v. Stein*, 5 Bush (Ky.), 652; *Roger Williams Ins. Co. v. Carrington*, 43 Mich. 252; *Mellen v. Hamilton F. Ins. Co.*, 17 N. Y. 609; *Brichta v. N. Y. Lafayette Ins. Co.*, 2 Hall (N. Y.), 372; *Goit v. Nat. Proteo'n Ins. Co.*, 25 Barb. (N. Y.) 189; *Courtney v. N. Y. City Ins. Co.*, 28 Barb. (N. Y.) 116; *DeWolf v. Capital City Ins. Co.*, 16 Hun (N. Y.), 116; *Greene v. Republic F. Ins. Co.*, 10 Ins. L. J. 422 (N. Y.); *People's Ins. Co. v. Straehle*, 2 Cin. S. C. R. (Oh.) 186; *Prows v. Oh. Val. Ins. Co.*, 2 Ib. 14; *Ins. Co. v. Jordan*, 7 Bul. (Oh.) 71; *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289; *Merch. Ins. Co. v. Scott*, 1 Posey (Tex.), 534; *Nease v. Ins. Co.*, 32 W. Va. 283; *Dogge v. Northwest. Nat. Ins. Co.*, 49 Wis. 501; *Spare v. Home Mut. Ins. Co.*, 9 Saw. 142 (D. Oreg.); *Bennett v. Md. F. Ins. Co.*, 14 Blatch. 422 (N. D. N. Y.); *Kerr v. Hastings Mut. F. Ins. Co.*, 41 U. C. Q. B. 217. See *Haskell v. Monmouth F. Ins. Co.*, 52 Me. 128, where the policy money was held to pass on assignment of a mortgage, etc., by contract. See also *Mershon v. Nat. Ins. Co.*, 34 Iowa, 87.

² *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508.

³ *Watertown F. Ins. Co. v. Grover*, 41 Mich. 131.

⁴ *Pennebaker v. Tomlinson*, 1 Tenn. Ch. 598.

from recovering; though in Iowa there is a statute as to validating assignments forbidden by the instrument assigned, which was a second reason for the conclusion of the Court.¹ But if the holder of a policy parts with his interest insured, an assignment after the loss of the policy will not help the assignee.²

281. As between the assignor and assignee, where the equities of other assignees are not concerned, no notice of the assignment of the policy need be given to the insurer; but where the rights of two or more successive assignees are concerned, notice is necessary to complete the assignment, and the one who first gives notice to the office gets a prior charge in the fund; for the insurer does not until then become trustee for the assignee, besides which there would otherwise be great room for fraud; and again all would not have been done, which could be done, to complete title.³ And by the law of Scotland an arrestment of the contents of a life policy is held preferable to a prior unintimated assignation of the policy delivered along with a letter of assignation to the assignee in England, where the debtor died before any new premium fell due.⁴ In *Hall v. Dorchester Mut. F. Ins. Co.*,⁵ where a policy, payable to a mortgagee, on which a total loss had occurred, was for a consideration delivered with an order upon it to pay the assignee the balance due after paying the mortgagee, and the company, having notice of the order, paid the balance to the insured on his assurance that the order amounted to nothing, it was held that the assignee could recover in the name of the insured the amount from the company. But if an assignee, with apparent title, is paid by the insurer without notice of an adverse claim, the person who afterwards claims has the full burden of establishing that he is entitled to the policy.⁶ In an early case in Massachusetts, it was held an assignment of a bill of lading with a policy, without notice, prevailed against a subsequent attaching creditor.⁷ But in Vermont it was held an assign-

¹ *Mershon v. Nat. Ins. Co.*, 34 Iowa, 87.

² *Jecko v. St. Louis F. & M. Ins. Co.*, 7 Mo. Ap. 308.

³ *Forster v. Cookerell*, 9 Bligh (N. C.), 332; *Fortescue v. Barnett*, 3 M. & K. 36; *Queen Ins. Co. v. Macpherson*, Steph. Dig. (N. B.) 532. See *Jones v. Gibbons*, 9 Ves. 407; *Gibson v. Over-*

bury, 7 M. & W. 555; *Succession of Risley*, 11 Rob. (La.) 298; *Bridge v. Conn. Mut. L. Ins. Co.*, 152 Mass. 343.

⁴ *Strachan v. McDongle*, 13 C. S. C. (1st Ser.) 954.

⁵ 111 Mass. 53.

⁶ *Home Mut. L. Ass'n v. Seager*, 12 Pa. St. 533.

⁷ *Wakefield v. Martin*, 3 Mass. 556.

ment without notice was ineffectual against a subsequent garnishment.¹ And in Iowa the failure of the assignee to give notice to the insurer until a judgment in a garnishment suit, was held to give the garnishment creditors a prior claim over the first assignee.² In Tennessee, the statute gives the assignee a legal title, and there the first assignee, notice or no notice, is preferred.³ In England, by the Policies of Assurance Act of 1867,⁴ the assignee is entitled to sue in his own name and give an effectual discharge for the policy moneys. But the effect of the Act is not to make life policies more assignable than before, but only to enable the assignee to sue without using the assignor's name.⁵

282. A covenant to insure as collateral, the deed containing no provision for the application of the policy money in case of a loss, does not vest the policy in the covenantee, and, without any notice by the covenantee, vests in the bankrupt's trustee.⁶ Though an assignment without notice will not be protected against a subsequent assignee, yet a policy deposited with a creditor, without any notice to the insurer, may create a lien which a subsequent bankruptcy will not disturb.⁷ An insured, domiciled in Jersey, deposited as collateral with a creditor in England a life policy effected in Jersey without notice to the company, and subsequently fraudulently obtained a duplicate policy, which he assigned to his wife, from whom he had a "*separation de biens*;" the latter assignment was notified to the company, and the insured paid the premiums and then made a "*cessio bonorum*" in Jersey, but no proofs of debt were registered by the creditor; it was held that English law prevailed and gave a lien to the creditor which the "*cessio bonorum*" in Jersey did not affect.⁸ But under the facts just described, it was also held that, though the deposit gave a lien on the policy, yet the *bonâ fide* subsequent assignment for a valuable consideration of the duplicate, which had been fraudulently obtained from the company without notice of the prior deposit, caused the

¹ Weed Sewing Machine Co. v. Bontelle, 56 Vt. 570.

² Walters v. Wash. Ins. Co., 1 Iowa, 404.

³ Mut. Protec'n Ins. Co. v. Hamilton, 5 Sneed (Tenn.), 269.

⁴ 30 & 31 Vict., c. 144, s. 1. See *post*, § 1207.

⁵ See remarks of Lord Bramwell with respect to a somewhat similar Act in *Pellias v. Neptune M. Ins. Co.*, 5 C. P. D. 34.

⁶ Lees v. Whiteley, L. R. 2 Eq. 143.

⁷ Gibson v. Overbury, 7 M. & W. 555. *Ex parte Cooper*, 6 Jur. 467; *LeFeuvre v. Sullivan*, 10 Moore, P. C. C. 1.

⁸ *LeFeuvre v. Sullivan*, *supra*.

title of the subsequent assignee to prevail.¹ But, where the insured assigned the policy by deed to A., who notified the company of the assignment, but left it in the insured's hands and paid the premiums, and the insured subsequently deposited it with B. for a loan, it was held the deed passed the policy to A., though he had been guilty of negligence in letting the insured retain it.² But a prior deposit of a policy by the insured, who agreed subsequently in writing with another to execute on request an effectual mortgage, gives, without notice to the insurer, the deposittee a better title than the holder of the memorandum who has given notice, as the latter is not put on inquiry by the absence of the policy, etc.³

§ 83. No particular form of notice is needed by the common law.⁴ Verbal notice of an assignment gives priority over subsequent incumbrances, though the officer of the insurer does not enter the same in the books.⁵ A letter to the insurance office by an equitable mortgagee of two policies, to the effect that he was the holder of the policies A. & B., with an inquiry what sum the office would give if they were delivered up to be cancelled, was held to be notice of a change of ownership.⁶ And a conversation by the assignee's attorney with the secretary, in which the latter was informed of the assignment, has been held sufficient.⁷ Mere loose talk, however, would be insufficient.⁸ Bankruptcy *ipso facto* is not notice, and therefore the omission to give notice of an assignment postpones assignees in bankruptcy to subsequent assignees for value.⁹ But where the insured, in pursuance of a covenant, assigned policies by a memorandum to trustees of a marriage settlement, and in a few days became bankrupt, was discharged, and died shortly after when the trustees notified the insurance office, but the assignee in bankruptcy had not been notified, nor knew anything about it, it was held the policies were in the disposition of the bankrupt at the date of the bankruptcy.¹⁰ Section 3 of the Policies of Assurance

¹ *LeFevre v. Sullivan*, 10 Moore, P. C. C. 1.

² *Neale v. Molineux*, 2 C. & K. 672.

³ *Spencer v. Clarke*, 9 Ch. D. 137.

⁴ *Ex parte Carbis*, 4 Dea. & C. 354.

⁵ *North Brit. Ins. Co. v. Hallett*, 7 Jur. n. s. 1263.

⁶ *Ex parte Stright*, 2 Dea. & C. 314.

⁷ *Ex parte Carbis*, 4 Dea. & C. 354.

⁸ *Alletson v. Chichester*, L. R. 10 C. P. 319. See also *Edwards v. Scott*, 2 Scott, N. R. 266; *Re Styan*, 1 Phil. Ch. 105; *Rawbones' Bequest*, 3 K. & J. 300.

⁹ *Barr's Trusts*, 4 K. & J. 219; affirming the doctrine of *Dearle v. Hall*, 3 Rus. 1.

¹⁰ *Ex parte Caldwell*, 20 W. R. 363,

Act of 1867 provided that no assignment of a policy of life assurance made after the Act shall confer on the assignee, his executors, etc., any right to sue for the amount of such policy until a written notice of the date and purport of such assignment shall have been given to the insurance company at their principal place of business or one of their principal places of business in England, Scotland, or Ireland; and the date on which such notice shall be received shall regulate the priority of all claims under any assignment; and a payment *bond fide* made by the company before the date on which such notice shall have been received by the company shall be valid against the assignee as if the Act had not been passed. But this has been held to relate only to the liabilities of the office to the assignees, and not to affect the rights, *inter se*, of persons claiming to be interested in the policy moneys; and therefore a second assignee without notice of a prior assignment, but who had duly notified the insurer, will not be preferred to a prior assignee who had not notified the company correctly within the terms of the Act.¹

It is stated by Mr. Porter on page *314, in his Treatise on Insurance, that the sixth subsection of section 25 of the Judicature Act of 1873, which provides that any absolute assignment in writing, not purporting to be by way of charge only, of any legal chose in action, of which express notice in writing has been given to the person from whom the assignor would have been entitled to receive the same, will pass the legal right and power to give a good discharge for the same, extends to the assignments of policies of insurance which are choses in action, and includes all policies, while the Policies of Assurance Act of 1867 only extends to policies granted by a corporation, association, society, or company.

284. A formal notice to the local Cork agent of a company whose head office was in Dublin, of the assignment of a life policy on his own life, was held not sufficient, as there was nothing to show that the insurance was a Cork rather than a Dublin transaction, where the general agent was.² Notice to an authorized agent of the insurer is sufficient;³ though under the English Act of 1867, not

¹ *Newman v. Newman*, 54 L. J. Ch. 119; *Ex parte Carbis*, 4 Dea. & C. 354; 598. *Ex parte Spiers*, 9 L. Can. R. 450; *Weed*

² *In re Hennessey*, 2 D. & W. (Ir.) 555. *Sewing Machine Co. v. Boutelle*, 56 Vt. 570.

³ *Gale v. Lewis*, 16 L. J. Q. B. x. s.

enough to vest the legal title in the assignee. As a general rule, notice to one of several trustees is to all; yet where the trustee is also assignor, in an assignment to a third party, the notice acquired as such does not constitute such notice to the other trustees as will prevail over subsequent incumbrances, because in the latter case the interest of the assignor is to cancel.¹ It was held in England that where all the members are partners, notice of assignment need not be given, to take it out of disposition of the assignor;² but this was overruled in *Thompson v. Spiers*.³

285. A life policy may also be the subject of a declaration of trust. Thus a policy, duly assigned on its back to B., in trust for the children of the assignor, which was found in the safe of the firm of which the assignor was a member, was held to constitute a valid trust against creditors, the insured being solvent at the date of assignment.⁴ So a valid trust was created where a paper, deposited with a tontine policy in a safe, was found, which stated "within is for my children, and to be divided amongst them if I die before it matures," coupled with a declaration of the insured to the same effect.⁵ To enable the donee to recover there must either be a valid gift by way of assignment, or a valid declaration of trust, for if the thing that is intended to act as an assignment be defective, it will not operate as a good declaration of trust.⁶

The general rule is that the beneficiary who is named will be regarded as having vested rights in the fund, and that the document will be considered as a declaration of trust in favor of such beneficiary on the part of the insured; which, though he may not be compelled to keep on foot, yet if he do, it will enure to the benefit of the beneficiary.⁷ Though in Wisconsin the rule is otherwise.⁸ And apparently

¹ *Browne v. Savage*, 4 Drew, 635.

P. 525; *Re Power*, L. R. 11 Ir. 93; *Ex parte Lewis*, L. R. 17 Ir. 424.

² *Duncan v. Chamberlayne*, 11 Sim. 123.

⁴ *Trough's Est.*, 8 Phila. 214.

³ 13 Sim. 469. See also *Jones v. Gibbons*, 9 Ves. 407; *Ex parte Colville*, 9 L. J. Ch. 56; *Thompson v. Speirs*, 13 Sim. 469; *Re Armstrong*, 1 Craw. & Dix. 37; *Williams v. Thorp*, 2 Sim. 257; *Ex parte Tennyson, Montague & B.* 67; *Green v. Ingham*, L. R. 2 C.

⁵ *Phipard v. Phipard*, 55 Hun (N. Y.), 433.

⁶ *Hayes v. Alliance Brit., Etc., Assur. Co.*, L. R. 8 Ir. 149; *Bliss v. Aetna L. Ins. Co.*, 19 Nov. Scot. 363; *Lemon v. Phoenix Mut. L. Ins. Co.*, 38 Conn. 294.

⁷ See *Johnson v. Van Epps*, 110 Ill.

⁸ See *Foster v. Gile*, 50 Wis. 603; *Est. of Breitung*, 78 Wis. 33.

it has been held in certain Courts that on the death of the beneficiary, the insured may again appoint.¹

286. It is not needful that the policy be delivered to the *cestuis que trustent*.² Though in Scotland it was held, reversing the Lord Ordinary, that a policy, taken by a husband in favor of trustees for the benefit of his wife and children, did not confer a vested right, without the knowledge, or constructive delivery, of the policy.³

287. Usually a policy taken by the insured payable to the insured's heirs, executors, administrators and assigns, goes to the estate of the insured, and, of course, may be assigned by him in his lifetime.⁴ And a policy made payable to the insured's "legal representatives,"⁵ or "heirs and representatives,"⁶ or "heirs and assigns,"⁷ vests in the estate of the insured and is assignable. Though in Missouri a policy payable to the insured's "heirs and representatives" was held to vest in the heirs or next of kin.⁸ And in Texas there is a dictum that the words "insured heirs" give a vested interest.⁹ In Tennessee, a policy to "legal heirs" by a father was held unassignable,¹⁰ and in Kentucky apparently a

551; *Sauerbrier v. Un. Cent. L. Ins. Co.*, 3 Sm. (Ill.) 620; *Wilburn v. Wilburn*, 83 Ind. 55; *Kline v. Nat. Benef. Ass'n*, 111 Ind. 462; *Van Bibber v. Van Bibber*, 82 Ky. 347; *Winchester v. Stebbins*, 16 Gray (Mass.), 52; *Bailey v. New Eng. Mut. L. Ins. Co.*, 114 Mass. 177; *Pingrey v. Nat. L. Ins. Co.*, 144 Mass. 374; *Allis v. Ware*, 28 Minn. 166; *Packard v. Conn. Mut. L. Ins. Co.*, 9 Mo. Ap. 469; *Hooker v. Sugg*, 102 N. C. 115; *Martin v. Mfrs. Acc. Co.*, 60 Hun (N. Y.), 535; *Central Bk. v. Hume*, 128 U. S. 195. See also *Kelley v. Mann*, 56 Iowa, 625; *Wilmaser v. Continen. L. Ins. Co.*, 66 Iowa, 417; *McClure v. Johnson*, 56 Iowa, 620.

¹ *Shields v. Sharp*, 35 Mo. Ap. 178; *Bickerton v. Jaques*, 28 Hun (N. Y.), 119.

² *Garner v. Germania L. Ins. Co.*, 110 N. Y. 266; *Fowler v. Butterly*, 12 J. & S. (N. Y.) 148; *Weston v. Richardson*, 47 L. T. N. S. 514.

³ *Jarvie's Trustee v. Ib.*, 14 C. S. C. (4th Ser.) 411.

⁴ *Rawson v. Jones*, 52 Ga. 458; *Swift v. R'way Pass., Etc., Ben. Ass'n*, 96 Ill. 309; *Pilcher v. N. Y. L. Ins. Co.*, 33 La. An. 322; *N. Y. L. Ins. Co. v. Flack*, 3 Md. 341; *Winchester v. Stebbins*, 16 Gray (Mass.), 652; *Mason v. Colburn*, 99 Mass. 342; *Com. Mut. L. Ins. Co. v. Ryan*, 8 Mo. Ap. 535; *Edington v. Aetna L. Ins. Co.*, 13 Hun (N. Y.), 543; *Williams v. Corson*, 5 Big. L. & Ac. Cas. 524 (Tenn.); *Gosling v. Caldwell*, 1 Lea (Tenn.), 454; *Un. Mut. L. Ins. Co. v. Stevens*, 19 Fed. R. 671 (N. D. Ill.).

⁵ *People v. Phelps*, 78 Ill. 147; *N. Y. L. Ins. Co. v. Flack*, 3 Md. 341.

⁶ *Wason v. Colburn*, 99 Mass. 342.

⁷ *Mullins v. Thompson*, 51 Tex. 7.

⁸ *Loos v. John Hancock Mut. L. Ins. Co.*, 41 Mo. 538.

⁹ *Mullins v. Thompson*, 51 Tex. 7.

¹⁰ *Gosling v. Caldwell*, 1 Lea (Tenn.), 454.

policy to "heirs" is also unassignable.¹ In Massachusetts a policy granted by a beneficial society, in the application for which the insured in answer to the insurer's question for whom it was intended, replied, "Myself," and which policy was made payable to his executors in trust for "his heirs-at-law," was held his and disposable by will.² Presumably the share in the policy that might arise in the insured by virtue of the death of the beneficiary, by will or under the intestate law, would be assignable.³

288. According to the foregoing principles, a policy by a husband in favor of his wife cannot be assigned by him;⁴ and in England and in many of the States statutes prevail upon this subject.⁵ By the Married Woman's Property Act of England of 1870,⁶ a policy by a husband on his own life, expressed on its face to be for the benefit of his wife, or of his wife and children, or any of them, was made a trust for the benefit of his wife, for her separate use, and of his children or any of them according to the interest expressed, so long as any object of the trust remained, freed from the control of the husband and his creditors. This Act was repealed by the Married Woman's Property Act of 1882, s. 22,⁷ but substantially the same provision was re-enacted, except that the phraseology differs slightly. The later Act speaks of a policy effected by a man for the benefit of his wife or of his children, or of his wife and children or any of them, and also omits the words "separate use" in providing the wife's enjoyment of the trust, probably because the Act had previously made what was considered sufficient provisions as to the property of a married woman.⁸ In Tennessee a policy for creditors by the husband, providing that the balance should go to the wife, was held not a wife's policy under the Code of that State, and that she had no absolute right till the creditors were paid.⁹ In

¹ *Weisert v. Muehl*, 81 Ky. 336

Booker, 9 Heisk. (Tenn.) 606; *Tenn.*

² *Harding v. Littlehale*, 150 Mass. 100.

Lodge v. Ladd, 5 Lea (Tenn.), 716; *Herrick v. Nat. L. Ins.*, 5 Ins. L. J. 80

³ *Macaulay v. Cent. Nat. Bank*, 27 S. C. 215.

(Vt.).

⁴ See *supra*.

⁵ *Pilcher v. N. Y. L. Ins. Co.*, 33 La. An. 322; *McCord v. Noyes*, 3 Bradf. (N. Y.) 139. See also *People v. Globe Mut. L. Ins. Co.*, 65 How. Pr. (N. Y.) 239; *Fowler v. Butterly*, 12 J. & S. (N. Y.) 148; *South. L. Ins. Co. v.*

⁶ 33 & 34 Vict., c. 93, s. 10.

⁷ *Ante*, § 275.

⁸ Per Chitty, J. *Re Adam's Policy Trusts*, 23 Ch. D. 529-530.

⁹ *Gwynne v. Mangum*, 14 Lea (Tenn.), 662.

Scotland, where a husband by a settlement had agreed with his wife that the fee at the death of the longest should be equally divided between their estates, and that each should have the life-rent of all the estate that should belong to either of them, and effected a policy after marriage on his wife's life, and, therefor, assigned the same to her, it was held on her death, as the husband had an income, not included in the settlement, sufficient to keep the policy up, it did not come within the marriage settlement.¹ But if a married woman, without fraudulent inducement, assign her interest in a policy on her husband's life it is valid.²

289. Where the policy is what is the endowment plan, that is, made payable to the husband, provided he reach a certain age, but, in the event of his prior decease, is for the benefit of the wife, this is not a wife's policy within the New York Act of 1840, though, if delivered, it is in the nature of a gift which the husband cannot assign without his wife's consent.³ And in Minnesota where a policy was payable to the insured in case he attain fifty, but in case of his prior death to his wife, and in case of her prior death payable to his heirs or assigns, it was held, if the husband survived the period, that he, and not his wife, took the endowment.⁴ In Alabama the law provides that a wife's policy shall be payable to her, but if she predecease "the life" to her children; and it was held that an endowment policy payable to her in case she survived her husband, but to him at the end of the endowment period, is not a wife's policy within the Act.⁵

290. Where the husband takes a policy for the wife's benefit and she predeceases, it has been held in Missouri,⁶ and Wisconsin,⁷ that the husband may appoint a new beneficiary or assign it, and the statute does not prevent him. In Illinois the question was left in *Johnson v. Van Epps*⁸ undecided, but it was held a policy payable to the wife's or the husband's legal representatives, on her pre-

¹ *Soot. Equit. L. Assur. Soc. v. Chapman*, 6 C. S. C. (3d Ser.) 17.

² *Winter v. Easum*, 2 DeG. J. & S., 272.

³ *Anderson v. Butterly*, 8 Ins. L. J. 97 (N. Y.)

⁴ *Tennes v. Northw. Mut. L. Ins. Co.*, 26 Minn. 271.

⁵ *Tompkins v. Levy*, 18 Ins. L. J. 720 (Ala.).

⁶ *Shields v. Sharp*, 35 Mo. Ap. 178; *Gambis v. Covenant Mut. L. Ins. Co.*, 50 Mo. 44. But see the dictum in *Charter Oak L. Ins. Co. v. Brant*, 47

Mo. 419, apparently to the contrary.

⁷ *Kerman v. Howard*, 23 Wis. 108.

⁸ 110 Ill. 551.

decease, may be appointed to a second wife. In Indiana on the wife's predecease it was held under the statute the husband could only assign the interest in the policy he was entitled to under the intestate laws as her survivor.¹ And in New York, substantially the same rule was applied, and a policy taken by the husband payable to a trustee for the wife's benefit, which, on her predecease, was assigned by the husband, was held to vest in the assignee; as, on the first wife's death, the husband took as survivor, her trustee becoming his trustee, and the common law right of survivorship was not affected by the Act of 1840, c. 80, as amended in 1862, or in 1873, in respect of insurance.²

291. Where the policy is for the benefit of the wife and children, it has been held the policy vests in them and cannot be assigned by the father and husband, though in some of the States the decisions were controlled by statutes.³ In a Massachusetts case it was left undecided whether without any statute the husband and father could assign.⁴ In Scotland, a policy in favor of the wife and heirs is apparently revocable.⁵ In England, on a petition by the surviving children of the insured and his wife, who had predeceased him, for a declaration of the children's rights, under a policy taken under the Married Woman's Property Act of 1870, the Court thought itself without jurisdiction to do more than make an order appointing a trustee, but prefaced the order with the opinion that the wife took only a life estate and the children as joint tenants, and added, in any event, as the trust was either for the wife for life, with remainder over to the children as joint tenants, or for the wife and children as joint tenants, the legal representatives of the deceased wife and child need not be served with the petition.⁶ In Kentucky, the statute⁷ provided that a policy for a wife and children should enure to the wife's separate

¹ *Harley v. Heist*, 86 Ind. 196.

² *Olmsted v. Keyes*, 85 N. Y. 593.

³ *Waldrom v. Waldrom*, 76 Ala. 285;

Succession of Kugler, 23 La. An. 455;

Gould v. Emerson, 99 Mass. 154; *Unity*

Mut. L. Assur. Ass'n v. Dugan, 118

Mass. 219; *Allis v. Ware*, 28 Minn.

166; *Leonard v. Clinton*, 26 Hun (N.

Y.), 288; *Burwell v. Snow*, 107 N. C.

82, 100 N. C. 377; *Ruppert v. Un.*

Mut. Ins. Co., 7 Rob. (N. Y.) 155;

Gosling v. Caldwell, 1 Lea (Tenn.),

454.

⁴ *Gould v. Emerson*, 99 Mass. 154.

⁵ *Craig v. Galloway*, 11 C. S. C. (2d

Ser.) 1211.

⁶ *Re Adams' Policy Trusts*, 52 L. J.

Ch. 642.

⁷ March 12, 1870.

use and benefit and that of her children. After the issue of such a policy and the death of the beneficiaries, the husband assigned and died, leaving a grandchild, and it was held the wife's share, on her death, passed to the children, and each child's share went to the survivors, and from the last surviving child to the grandchild.¹ In the Federal Court in Illinois, it was held a policy by the husband made payable to his wife "and heirs," may be allowed to lapse if she predecease him, and be substituted for another policy, though it was not decided whether the words "and heirs" meant his or hers.² A policy taken by the wife and payable to her, if living at her husband's death, but if not, to the children, is not assignable in Connecticut, where a statute exists.³ In Minnesota, where there was no statute on the subject, a policy payable to the wife, A., if then living, and if not, to the insured's children, was held, on A. dying and the insured surrendering and getting a paid-up policy for a second wife, to go to the children of both ventres, and that the surrender was bad.⁴

292. A policy payable to an infant has likewise been held unassignable.⁵ In the Federal Court in Wisconsin, Dyer, D. J., declined to follow the principles of the Wisconsin cases above cited.⁶ But in the State Courts of Wisconsin, a policy for an infant may be assigned where the assignee keeps up the policy.⁷ If the infant joins his father in the assignment of a policy payable to the former, in New Hampshire, he may avoid it on coming of age, on repaying the premiums.⁸ An adult child could assign his share.⁹ Where the policy is in the nature of a tontine or endowment policy, payable to the husband at the end of a certain period, but on his prior death to his wife and children, the husband would have an assignable interest in the policy.¹⁰ In New York, where, in *Ferdon v. Canfield*,¹¹

¹ *Robinson v. Duvall*, 9 Ins. L. J. 897 (Ky.).

² *Un. Mut. L. Ins. Co. v. Stevens*, 19 Fed. R. 671 (N. D. Ill.).

³ *Chapin v. Fellowes*, 36 Conn. 132.
⁴ *Ricker v. Charter Oak L. Ins. Co.*, 27 Minn. 193.

⁵ *Brockhaus v. Kemua*, 7 Fed. R. 61 (E. D. Wis.); *City Sav. Bk. v. Whittle*, 63 N. H. 587. See *Scott v. Scott*, 20 Ont. R. 313.

⁶ *Ante*, § 285.

⁷ *Clark v. Durand*, 12 Wis. 223.

⁸ *City Sav. Bank v. Whittle*, 63 N. H. 587.

⁹ *Hewlett v. Home of Incurables*, 74 Md. 350; *Boyd v. Mass. Mut. L. Ins. Co.*, 153 Mass. 544. See also *Foley v. Mut. L. Ins. Co.*, 64 Hun (N. Y.), 63.

¹⁰ *White v. Smith*, 2 W. (Tex.) § 399.

¹¹ *Ferdon v. Canfield*, 104 N. Y. 143.

a tontine policy was held unassignable by the father, the facts showed that the beneficiaries had really procured and kept on foot the policy and were the legal owners of it. Where the insured assigned a policy in trust for the benefit of his child if he reached twenty-five, but, if he died under that age, for A., provided the insured should think proper to keep up the policy, but he was to be at liberty to sell the policy and retain the money, in case of failure to do so, a mortgage of the policy after his son's death, with the agreement to keep it up, is valid, for as the insured could sell, he could attach any condition to the sale.¹

293. By the law of England a wife could join her husband in an assignment of her interest in a policy on his life.² In *Godsal v. Webb*,³ from the character of the paper, which was a mixture of trust and agreement, under which the husband was only to get, except by gift from his wife, a life interest in a policy on his wife's life, if she predeceased him, it was open to the husband and wife during their joint lives; he and she, or she as the survivor, could set aside the policy, which was solely for her or their benefit, and therefore an assignment by the wife of the policy effected by a trustee for the benefit of the husband should he survive, but on his decease before her to her appointees by will, and in default thereof to the distributees under the statute of distributions after the husband's decease, the wife and the trustee joining, was held valid. In Scotland, in *Schuman v. Scottish Widow's Fund & L. Assur. Soc.*, there had been a policy effected by the husband for his wife's benefit under the Married Woman's Act of 43 & 44 Vict., c. 26, sec. 2,⁴ and on their both desiring to surrender it, Lord Shand thought the husband could get the surrender value without his wife uniting with him. For the section of the Act provided that the policy was to be "in trust always, and shall not otherwise be subject to the husband's control, or form part of his estate, or be liable to the diligence of his creditors, or be revocable as a donation, or reducible on any ground of excess or insolvency." And it gave the wife the power to deal with it as she pleased, but did not provide that the husband should not get its surrender value; and if he could not do this, if he saw he could not afford to keep the policy up, he must let it lapse,

¹ *Pedder v. Mosely*, 31 Beav. 159.

² 2 Keen, 99.

³ See *Winter v. Easum*, 2 DeG., J. & S. 272.

⁴ 13 C. S. C. (4th Ser.) 678.

⁵ 1880.

which would be greatly to the detriment of his wife and obviously not within the meaning of the Act. For the Act, meaning to bestow a benefit, could not be interpreted as prohibiting a surrender value, which would be greatly to their interest to exercise, and might destroy the whole value of the policy if it were not exercised. A policy taken out by a husband for the separate use of his wife, under this Act may be surrendered by both for its value, as the Act does not oppose this in any way.¹

294. In Colorado a policy on her husband's life for her benefit, may be assigned by the wife.² So also in Connecticut.³ And if she endorse her name in blank on a policy on the life of her husband taken for her benefit, and delivers it to her husband to enable him to pledge it, it will estop the wife from denying the husband's right to use it.⁴ But if her husband, without her knowledge, fill out an assignment, not merely for the proposed loan, but also as security for a pre-existing debt of his own, it has been held she will not be bound by the assignment.⁵ By the Code of Georgia, an assignment by the wife is void; and, therefore, she cannot afterwards ratify one previously made.⁶ In Illinois, she may assign;⁷ and if she endorse a policy which her husband pledges for a loan, she is estopped from claiming it.⁸ In Indiana, the Act of 1848 as to women's insurances, was apparently repealed in 1852.⁹ But prior to the Acts of March 25, 1879, and 1881, forbidding a married woman to encumber her separate property as security, or from entering into any contract of suretyship, she could with her husband's consent assign.¹⁰ She could not, however, make an executory contract;¹¹ and, therefore, an assignment for value in 1877, made in Illinois, where she was domiciled, which was valid both there and in Indiana, was enforced after 1879 in Indiana.¹² In Louisiana she may certainly assign with

¹ *Schumann v. Scottish Widow's Fund & L. Assur. Soc.*, 13 C. S. C. 253. 40 Ill. 398; *Norwood v. Guerdon*, 60 Ill. (4th Ser.) 678.

² *Collins v. Dawley*, 4 Colo. 138.

³ *Conn. Mut. L. Ins. Co. v. Westervelt*, 52 Conn. 586.

⁴ *Ib.*

⁵ *Ib.*

⁶ *Smith v. Haed*, 75 Ga. 765.

⁷ *Pomeroy v. Manhattan L. Ins. Co.*,

⁸ *Norwood v. Guerdon*, 60 Ill. 253.

⁹ *Hutson v. Merrifield*, 51 Ind. 24.

¹⁰ *Pence v. Makepeace*, 65 Ind. 345; *Hutson v. Merrifield*, 51 Ib. 24; *Damron v. Penn Mut. L. Ins. Co.*, 99 Ib. 478.

¹¹ *Godfrey v. Wilson*, 70 Ind. 50.

¹² *Damron v. Penn Mut. L. Ins. Co.*, 99 Ind. 478.

her husband her interest.¹ In Maryland, the wife joining with the husband, may assign, by virtue of the Code,² and her sole signature on a policy for her separate use is good if assigned with his assent.³ In Massachusetts, she could probably assign her interest.⁴ In Minnesota, it was held, in any event, if the wife assign as a surety for her husband and he enlarges the original contract, she is released.⁵ In Michigan, in *Mut. Benef. L. Ins. Co. v. Wayne Sav. Bk.*,⁶ it was held a wife certainly cannot assign, by an executory contract, unless on behalf of her separate property. In Missouri,⁷ the wife may assign her interest. In New Jersey, it was held a husband and wife could assign as collateral for the husband's debt, provided she live long enough to enable the assignee to have it reduced into possession, but if the policy is to her on the husband's death, then it must be reduced into possession before he dies.⁸ By the Married Woman's Act of New Jersey, a policy becomes her property and she may do what she pleases with it; and it seemed to be immaterial that the fund created by the insurance company's statute of incorporation was only created for a particular purpose, as the general act applicable did not intend to restrain it to that purpose, and only expressly exempts policies from creditors when the annual premium does not exceed one hundred dollars.⁹ But where an administrator had released the indorsement in a note, which represented his intestate's claim against the husband, it was held the wife could get back the policies assigned to secure her husband's debt, though unquestioned for several years.¹⁰

295. In New York, the Act of 1840, c. 80,¹¹ was passed, which,

¹ *Pilcher v. N. Y. L. Ins. Co.*, 33 La. An. 322.

² *Emerick v. Coakley*, 35 Md. 188; *Whitridge v. Barry*, 42 Md. 140.

³ *Whitridge v. Barry*, 42 Md. 140.

⁴ *Knickerbocker L. Ins. Co. v. Weitz*, 99 Mass. 157.

⁵ *Allis v. Ware*, 28 Minn. 166.

⁶ 68 Mich. 116.

⁷ *Charter Oak L. Ins. Co. v. Brant*, 47 Mo. 419; *Conn. Mut. L. Ins. Co. v. Ryan*, 8 Mo. Ap. 535.

⁸ *De Ronge v. Elliott*, 8 C. E. Gr. (N. J.) 486.

⁹ *De Ronge v. Elliott*, *supra*. See also *O'Mara v. Nugent*, 37 N. J. Eq. 326.

¹⁰ *O'Mara v. Nugent*, *supra*.

¹¹ "§ 1. It shall be lawful for any married woman, by herself, and in her name, or in the name of any third person, with his assent, as her trustee, to cause to be insured, for her sole use, the life of her husband for any definite period, or for the term of his natural life; and in case of her surviving her husband, the . . . insurance shall be payable to her to and for her own use, free from the claims of the repre-

provided for married women's policies. A policy taken by a married woman or her husband on his life for her benefit under this Act has been held unassignable, on the ground that to permit her to assign it would defeat the object of the Act, which was to enable her to enjoy the benefit of a policy for her sole use, though prior to the enabling Act of 1873 a married woman could under certain circumstances assign a policy for her benefit.¹ Apparently the Act of 1840, c. 80, was not affected by the Act of 1858, c. 187, or of 1862, c. 70, or of 1866, c. 650, or of 1870, c. 277, which all enlarged the *status* of married women.² The Act of 1840, c. 80, appears to have been considered as enabling, made for the purpose of permitting the insured to provide for his family; and the principle upon which the Courts in New York in general have proceeded as to the assignability of married women's policies, does not seem to be derived from the phraseology of the Act of 1840, but is made to depend on the ordinary rules of law.³ Therefore a policy must be brought within the Act to render it unassignable by her. In *Eadie v. Slimmon*,⁴ the Act does not appear to have been referred to in the policy, but as it was made on her husband's life for her sole use, or on her death payable to her children, it was held within its scope. In *Barry v. Equitable L. Assur. Soc.*,⁵ the policy was for the same purposes, and the Act was referred to.⁶ In *Wilson v. Lawrence*,⁷ the Act was not referred to, but as the object was clearly to provide for the wife, the policy being payable to her at his death, he paying all the premiums, it was held within the equity of the statute, and it was also stated that the fact that children were not referred to was not material, as there was no evidence that the parties had

representatives of her husband, etc. § 2. In case of the death of the wife before the decease of her husband, the amount of the insurance may be made payable after her death to her children for their use."

¹ *Eadie v. Slimmon*, 26 N. Y. 9; *Barry v. Equit. L. Assur. Soc.*, 59 N. Y. 587; *Barry v. Brune*, 71 N. Y. 261; *Wilson v. Lawrence*, 76 N. Y. 585; 13 Hun (N. Y.), 238; *Brummer v. Cohn*, 86 N. Y. 11; *De Jonge v. Goldsmith*, 86 N. Y. 614; *Frank v. Mut. L.*

Ins. Co., 102 N. Y. 266; *Leonard v. Clinton*, 26 Hun (N. Y.), 288.

² *Barry v. Equitable L. Assur. Soc.*, 59 N. Y. 587.

³ *Frank v. Mut. L. Ins. Co.*, 102 N. Y. 266.

⁴ 26 N. Y. 9.

⁵ 59 N. Y. 587.

⁶ See *Fowler v. Butterly*, 12 J. & S. (N. Y.) 148; *Leonard v. Clinton*, 26 Hun (N. Y.), 288.

⁷ 76 N. Y. 595; 13 Hun (N. Y.), 238.

any. In *Brummer v. Cohn*,¹ it was held that to bring the policy within the Act a direct declaration of intention need not appear, but the nature of the policy may afford a sufficient presumption, and *quere* whether extrinsic evidence is admissible to show it was not intended to be within the Act.² An endowment policy would also come within the Act, as amended by the Act of 1866, c. 656.³ And the omission in such a policy for the wife on her husband's life, to provide for the disposition of the fund in case of her prior death, or a statement in the application that the policy was for her solely, does not rebut the presumption that the policy was intended by the parties to be under the Act of 1840.⁴ In *Whitehead v. N. Y. L. Ins. Co.*,⁵ it was decided that it was not necessary in order to bring it within the Act that the children or wife should know of its existence, as it vested in them in any event. And it seems immaterial whether the husband or the wife pays the premiums.⁶

In most of the above cases, if not all, the assignment was for the benefit of the husband. In *Robinson v. Mut. Benef. L. Ins. Co.*,⁷ there was a policy payable to the wife "or assigns," which the wife assigned with her husband to A. under an agreement that he should pay all future premiums, and on the death of the husband pay a certain sum to his wife and keep the residue, was held valid, as it was really collateral security for the payment of the premiums.

296. After a surrender by the assignee to the company the wife may recover the surrender value less the premiums paid by him.⁸ But after a wife's assignment, and a notice to pay the premiums, she cannot neglect to do so, and sue the company on a surrender by the assignee, in tort for their act; for on a failure to pay the premium the policy would be void in the assignee's, as well as in her hands, and the fact that the company marked it paid was immaterial, as her duty was to have tendered the money and thus have avoided the assignment.⁹ Under the Act of 1873, c. 341,

¹ 86 N. Y. 11. See also *Frank v. Mut. L. Ins. Co.*, 102 N. Y. 266.

² See also *De Jonge v. Goldsmith*, 86 N. Y. 614; *Brick v. Campbell*, 122 N. Y. 337.

³ *Brummer v. Cohn*, 86 N. Y. 11; *De Jonge v. Goldsmith*, 86 N. Y. 614.

⁴ *Ib.*

⁵ 102 N. Y. 143.

⁶ *Frank v. Mut. L. Ins. Co.*, 102 N. Y. 266.

⁷ 16 Blatch (N. D. N. Y.), 194.

⁸ *Frank v. Mut. L. Ins. Co.*, 102 N. Y. 266.

⁹ *Frank v. Mut. L. Ins. Co.*, 102 N. Y. 266. See also *Schneider v. U. S. L. Ins. Co.*, 123 N. Y. 109.

a married woman may assign her policy on going through certain formalities, if she have no children.¹ And if, after an assignment during her children's lifetime, they die, the inference may arise by lapse of time that she has ratified the policy.²

297. By the Act of 1879, c. 248, the wife with her husband's consent in writing may assign, whether she has or has not children.³ But she can only assign by virtue of the statute, and the Court cannot compel her to.⁴ An illegal assignment by a married woman before the Act of 1879 is not validated when she did not move till 1882.⁵ The joinder of the husband in the assignment is a sufficient writing.⁶ An endowment policy to the wife, but made payable to the children if she dies before the term expires, does not make the children's interest material unless such a contingency occur.⁷ It has been stated that the Act of 1840 does not apply to mutual accident societies.⁸

298. In Ohio, by the statute,⁹ the policy belongs to the wife, and without her assent the husband cannot assign it.¹⁰ And *semble*, if he do not keep it up she may do so on notice.¹¹ In Wisconsin, a married woman may assign a policy.¹² In the District of Columbia, by the law of the District, the wife may assign during her husband's lifetime with his consent a paid-up policy taken by him on his life for her benefit.¹³ And it was held, on the assumption that the contract was a Connecticut one, that such a policy was not within the purview of the statute of that State as to married women's policies, and was by the law of Connecticut also assignable.¹⁴

¹ *Frank v. Mut. L. Ins. Co.*, 102 N. Y. 266; *Brick v. Campbell*, 22 J. & S. (N. Y.) 305; *Leonard v. Clinton*, 26 Hun (N. Y.), 288; *Fowler v. Butterly*, 12 J. & S. (N. Y.) 148.

² *Brick v. Campbell*, 22 J. & S. (N. Y.) 305.

³ *Frank v. Mut. L. Ins. Co.*, 102 N. Y. 266; *Anderson v. Goldsmidt*, 103 N. Y. 617.

⁴ *Baron v. Brummer*, 100 N. Y. 372.

⁵ *Brick v. Campbell*, 122 N. Y. 337.

⁶ *Anderson v. Goldsmidt*, 103 N. Y. 617.

⁷ *Anderson v. Goldsmidt*, 103 N. Y. 176.

⁸ *Steinhausen v. Mut. Acc. Ass'n*, 59 Hun (N. Y.), 336.

⁹ *Swan's Stat.*, s. 8 (49 Oh. L. 220).

¹⁰ *Fraternal Mut. L. Ins. Co. v. Applegate*, 7 Oh. St. 292; *Manhattan L. Ins. Co. v. Smith*, 44 Oh. St. 156.

¹¹ *Manhattan L. Ins. Co. v. Smith*, *supra*.

¹² *Archibould v. Mut. L. Ins. Co.*, 38 Wis. 542.

¹³ *Ford v. Travellers' Ins. Co.*, 6 Mack. (D. C.) 384.

¹⁴ *Ib.*

299. In Connecticut, where there existed a statute protecting the wife, a policy for her, but in case of her predecease for her children, was held to give her only a contingent interest which became absolute on her husband dying first.¹ In Massachusetts under the provisions of the Statute of 1864, c. 197, which provides that a policy on the life of any one assigned or made payable to a married woman, or in trust for her, shall enure to her separate use and benefit and that of her children independently of her husband or his creditors, etc., it was held she could in no event assign more than her own interest in a policy payable on her predecease to a child or his guardian.² In the Federal Court for the District of Massachusetts, where the children were not mentioned, the wife was considered, at all events, to have a life interest which she might assign, and it was intimated by Lowell, J., that the Act was intended to give the wife an absolute interest if she survived, with only a contingent interest in the children, and that in any event she could assign a life interest; and that a creditor could be paid out of the moneys accumulated on an endowment policy up to the death of the wife, sufficient to pay his debt.³ In New York it was held that the change from an ordinary policy for the wife's sole use, and in the event of her predecease to her children, to a paid-up policy, is not material.⁴ In Rhode Island a policy payable to the wife and children can only be assigned up to the wife's interest.⁵ And where it was made payable by the husband to his wife and four children by a former wife, the second wife could assign one-fifth.⁶

300. In New Jersey a policy taken by the mother in favor of her children was held assignable where the assignee had agreed to keep it up subsequently, but the latter was only entitled to recover the value of the policy at the death, after deducting its value at the date of the assignment, for up to that date it was held an executed gift.⁷ In New York a policy taken "in trust for children" gives

¹ Conn. Mut. L. Ins. Co. v. Burroughs, 34 Conn. 305. rights in New York to assign under the Act of 1840, c. 80.

² Knickerbocker L. Ins. Co. v. Weitz, 99 Mass. 157. ³ Conn. Mut. L. Ins. Co. v. Baldwin, 14 Ins. L. J. 813 (R. I.).

⁴ Newcomb v. Mut. L. Ins. Co., 9 Ins. L. J. 124 (D. Mass.). ⁵ *Ib.*

⁶ Mut. L. Ins. Co. v. Terry, 62 How. Pr. (N. Y.) 325. See also the cases cited in reference to married women's ⁷ Landrum v. Knowles, 7 C. E. Gr. (N. J.) 594. See also Nat. L. Ins. Co. v. Haley, 78 Me. 268.

to the beneficiaries a vested right.¹ And its renewal even after its lapse to the insured will not prevent a recovery by the *cestuis que trustent* when the life falls in, where the insurer waived the cause of forfeiture.²

301. Where there is issued a policy which the insured is prohibited from surrendering without the assent of the beneficiary, or even at all, if a surrender is had and a new policy is issued in exchange which is substantially similar, the benefit of the substituted policy will go in equity to the beneficiaries illegally deprived of the first policy.³ In Maine, where the wife had paid the premiums up to her death on a policy for her, her heirs, etc., and the husband paid on the new policy to his heirs, etc., it was held the fund should be divided between the two estates in the proportion of premiums paid by each decedent.⁴ But if the old policy is void before surrender, the insurer may issue a substituted one in part consideration of the surrender of the old one, without waiving its invalidity.⁵

In New York, it has been decided that after delivering a policy in trust for one to the trustee, the settler insured cannot, without a reservation in the policy to that effect, make a subsequent agreement with the insurer as to the substitution of a new trustee.⁶ Though where a life policy is made payable to or held by another, but held in whole or in part for the insured or his appointee, it was decided in the same State that the insured may revoke the authority of the holder or change the condition of holding or annex new conditions.⁷

302. Sometimes in a policy to several beneficiaries one of whom has a vested and the others contingent interests, the contract itself expressly empowers the insured to substitute on the death of a beneficiary a new nominee. Thus, for example, where in a policy

¹ *Garner v. Germania L. Ins. Co.*, 268; *Garner v. Germania L. Ins. Co.*, 110 N. Y. 266.

² *Ib.*

⁴ *Nat. L. Ins. Co. v. Haley*, 78 Me. 268.

³ *Chapin v. Fellowes*, 36 Conn. 132; *Norwood v. Guerdon*, 60 Ill. 253; *Whitehead v. N. Y. L. Ins. Co.*, 102 N. Y. 143.

⁵ *Butler v. State Mut. L. Assur. Co.*, 55 Hun (N. Y.), 296.

⁶ *Hutchings v. Miner*, 46 N. Y. 456.

⁷ *Timayens v. Un. Mut. L. Ins. Co.*, 61 Fed. T. 223 (S. D. N. Y.). See also *Nat. L. Ins. Co. v. Haley*, 78 Me.

which was made payable to the wife of the insured at his death, but if she predecease him then to her children, there was a provision "that in case of the decease of the wife during the lifetime of the assured the said assured may at his option substitute any other beneficiary under the policy;" and it was held, while the wife has only a contingent interest which is revoked by her death, still the substitution must be made before the payment of the next premium, as otherwise the contract would then vest the interest in the children.¹

303. In many beneficial societies there is a provision in the act of incorporation or charter which specially allows the member insured to control, during his membership, the certificate or policy issued and to change the name of a beneficiary, usually by a method pointed out.² Though sometimes the charter forbids a new appointment, and directs how the fund in such a case shall go.³

304. Not infrequently such a society, by the charter or act of incorporation, confines possible beneficiaries to certain classes of people, as widows, orphans, dependents, etc.; and when this is the case, it is obvious that the assignee or new appointee cannot take unless he fall within the class.⁴ Thus, where the by-laws of a society in Massachusetts, organized under the Pub. Sts. sec. 1 c. 115, which provided for beneficial associations for the benefit of widows, orphans, or other dependents, permitted heirs to take, it was held they must be limited to such as under the charter could take; and the decedent's mother, to whom the certificate was altered from the name of the wife, not being, as his charter required, dependent

¹ *Eiseman v. Judah*, 1 Flip. 627 (W. Knights of Honor v. Watson, 64 N. H. D. Tenn.). 517; *Tafel v. Supreme Commandery*,

² See *Johnson v. Hall*, 55 Ark. 210; 13 Ins. L. J. 932 (Oh.); *Beatty's Ap.*, Block v. Val. Mut. Ins. Ass'n, 20 Ins. 122 Pa. St. 428; *Splawn v. Chew*, 60 L. J. 555 (Ark.); *Rollins v. McHatton*, Tex. 532; *Byrne v. Casey*, 70 Tex. 16 Colo. 203. *Nally v. Nally*, 74 Ga. 247; *Gentry v. Supreme Lodge*, 23 Fed. 669; *Martin v. Stubbings*, 126 Ill. R. 718 (D. Ind.); *Supreme Conclave v. Cappella*, 41 Fed. R. 1 (E. D. 387; *Munhall v. Daly*, 37 Ill. Ap. 522; Holland v. Taylor, 111 Ind. 121; *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Mich.).

³ *Presbyterian Mut. Assur. Fund v. Allen*, 106 Ind. 593.

⁴ *Briggs v. Earl*, 1 N. East. R. (Mass.) 847; *Mich. Mut. Benef. Ass'n v. Rolfe*, 76 Mich. 146; *Schonfield v. Turner*, 75 Richmond v. Johnson, 28 Minn. 44; Tex. 324.

could not take.¹ Though now under the Act of 1882, c. 195, s. 2, such a society in Massachusetts is allowed to assist widows, orphans, "or other relatives of deceased members."² And on the other hand, where the charter declared the objects of bounty shall be the widow, etc., and legatees, and the by-laws provided that the insured should not change the beneficiary unless with the directors' consent, and the beneficiary having appointed his sister, willed it to his illegitimate son, it was held the charter would prevail over the by-laws and the son take.³ But while during the life of a member the benefit cannot be assigned to one outside the charter class, it has been held, after his death, the widow beneficiary may assign her share to a creditor.⁴ Certain beneficial societies allow appointment without restrictions of a portion or of the whole of the fund.⁵ In Illinois, it has been held while a mutual benefit society is not technically a life insurance company within the statute of the State, yet its certificate is in the nature of insurance contracts, and unless otherwise provided for is governed by the same rules as to assignment; and, therefore, where the statute allowed a member to name his legatee or devisee as beneficiary he may name a creditor.⁶

305. Where the society provides for certain formalities on a reappointment or assignment these must be followed to vest the fund in the new party.⁷ And a society may make reasonable regulations as to such matters.⁸ But a mere technicality in appointing may not be fatal to the new appointment. Thus, where a member was entitled to appoint a beneficiary named by him and entered in the society's "will-book," and after entering a name he made a will

¹ *Elsey v. Odd Fellows' Mut. Relief Ass'n*, 7 N. East. R. 844 (Mass.).

² *Marsh v. Supreme Council*, 149 Mass. 512.

³ *Raub. v. Masonic Mut. Relief Ass'n*, 3 Mack. (D. C.) 68.

⁴ *Briggs v. Earl*, 1 N. East. R. 847 (Mass.).

⁵ See *MacClean's Trusts*, 19 Eq. Cas. 274; *Martin v. Stubbings*, 126 Ill. 387.

⁶ *Martin v. Stubbings*, 126 Ill. 387.

⁷ *Order of Mutual Companions v. Griest*, 76 Cal. 494; *Bowman v. Moore*, 87 Cal. 306; *Hainer v. Iowa Legion of Honor*, 78 Iowa, 245; *Commw. v. Un-*

ity Mut. L. Assur. Co., 117 Mass. 337; *McCarthy v. Supreme Lodge*, 153 Ib.

314; *Un. Mut. Ass'n v. Montgomery*, 70 Mich. 587; *Supreme Lodge v. Mor-*

gan, 15 Ins. L. J. 529 (Ky.); *Thomas v. Thomas*, 131 N. Y. 205; *Luhrs v.*

Luhrs, 123 N. Y. 367; *McNeil v. Unit. Order of Golden Cross*, 131 Pa. St. 339;

Jenks v. Banner Lodge, 21 Atlan. R. 4 (Pa.); *Harman v. Lewis*, 14 Ins. L.

J. 927 (E. D. Mo.).

⁸ *Un. Mut. Ass'n v. Montgomery*, 70 Mich. 587. See also *Catholic Knights v. Kuhn*, 18 S. W. 385 (Tenn.).

revoking the nomination, and directed the fund to go in a specified way, it was held sufficient.¹ So, where the agreement was to pay to the insured's "devisees, or, if no will, to the heirs-at-law," and the insured devised and bequeathed all property, real, personal, or mixed, of which he should "die seized," it was held sufficient, though he was not technically seized of the money.² But a formality is not necessarily a technicality, and where the designation is to be by writing, signed by two witnesses, and acknowledged before a justice, a will in the usual form not acknowledged before a notary is a bad appointment.³ If the first appointment is regular, and the second defective, the beneficiary first named will take the money.⁴ But where the defect was owing to a refusal of the society to grant a new certificate, on the duly expressed desire to change the beneficiary, till the old one, which was lost, was produced, it was held the prior beneficiary was not entitled to the fund.⁵ If both the appointments are defective, but the insurer is willing to pay the representatives of the first beneficiary, no one can complain of an order of the Court that the money be paid to the executor of the member.⁶ The assignee must be entitled to take under the assignment, as well as the assignor make it. If no formality is pointed out, the change may be by will.⁷ Unless a rule requires some formality, a mere custom of the company is not binding.⁸

But a man may contract with the appointee not to change.⁹

306. In Missouri, a husband may assign a policy by parol to his wife.¹⁰ In New York, by the Act of 1860, a wife may be directly the assignee of a policy by her husband on his life, so as to bring it within the Act of 1840, c. 80.¹¹ In Nova Scotia, apparently the

¹ *Supreme Council v. Priest*, 10 Ins. L. J. 579 (Mich.).

² *Aveling v. Northw. Masonic Aid Ass'n*, 72 Mich. 7.

³ *Mellows v. Mellows*, 61 N. H. 137.

⁴ *Highland v. Highland*, 109 Ill. 366;

Holland v. Taylor, 111 Ind. 121;

Stephenson v. Stephenson, 64 Iowa, 534;

Wendt v. Iowa Legion of Honor, 72 Iowa, 632; *Olmstead v. Masonic Mut. Ben. Soc.*, 37 Kan. 93; *Hotel-Men's Mut. Ben. Ass'n v. Brown*, 33

Fed. R. 11 (N. D. Ill.).

⁵ *Grand Lodge v. Child*, 70 Mich. 163. See also *Isgrigg v. Schorley*, 125 Ind. 94.

⁶ *Order of Mutual Companions v. Griest*, 76 Cal. 494.

⁷ *Mason. Benef. Ass'n v. Bunch*, 19 S. W. 25 (Mo.).

⁸ *Hirschel v. Clark*, 81 Iowa, 200.

⁹ *Smith v. Nat. Benef. Soc.*, 123 N. Y. 85.

¹⁰ *Chapman v. McIwrath*, 77 Mo. 38.

¹¹ *Leonard v. Clinton*, 26 Hun (N. Y.), 288.

husband cannot assign directly to the wife;¹ and where the assignment was directly to her and the children, a suit by her could not be sustained even for the child's benefit, for, as it was bad as to her, she could not take title as trustee for the children unless appointed by the Court, even supposing the assignment to a child directly would be good.²

307. Where the contract of insurance as to property is assigned to an alienee of the subject-matter, or where it is assigned to a mortgagee or pledgee, it is necessary the assignee should have an insurable interest.³ But in the case of an assignment to the mortgagee or pledgee, a distinction must be observed, as has been previously pointed out, between an assignment of the contract and an assignment by way of mortgage of the policy itself; the latter not being an assignment of the contract, but an equitable mortgage or charge on the fund which may be realized; and as the latter is not a technical assignment of the contract at all, it does not therefore necessitate any interest in the holder of the policy.⁴

308. By the common law the insured was not required to have any insurable interest in the life, and consequently none was required in the assignee of the policy, and as the Statute of 14 Geo. III. only necessitated an interest at the inception of the contract, and did not require any in the assignee, the assignee in England need not have any interest in the life.⁵ In the United States, the decisions are inharmonious; a few States follow the common law,⁶ and that rule apparently exists also in Canada.⁷ It was

¹ *Bliss v. Ætna L. Ins. Co.*, 19 Nova Scotia, 363. & *Globe Ins. Co.*, 20 U. C. C. P. 523; *Davies v. Home Ins. Co.*, 3 Er. & Ap. (Can.) 269.

² *Ib.* See also *Lee v. Abdy*, 17 Q. B. D. 309. ⁴ *Ante*, § 262.

³ See *Cit. F. Ins., Etc., Co. v. Doll*, 35 Md. 89; *Bayles v. Ins. Co.*, 3 Dutch. ante, §§ 4, 183. ⁵ *Ashley v. Ashley*, 3 Sim. 149. See

(N. J.) 163; *Hooper v. Hudson River F. Ins. Co.*, 17 N. Y. 424; *Hand v. Williamsburg City F. Ins. Co.*, 57 N. Y. 41; *Peabody v. Wash. Co. Mut. Ins. Co.*, 20 Barb. (N. Y.) 339; *Ap-pleton Iron Co. v. Brit. Amer. Assur. Co.*, 46 Wis. 23; *Todd v. Liv. & Lond. Soc.*, 72 Md. 511. In *Stevens v. War-*

⁷ *Vezina v. N. Y. L. Ins. Co.*, 3 L. N. (Can.), 322.

however, held in England, in *Wainwright v. Bland*,¹ that a policy which, though nominally taken out by the assignor, is in reality taken and maintained by the assignee as a mere cover for a wager, is an evasion of the Act of 14 Geo. III., and is void. But the judgment in this case, on a rule for a new trial, was upheld on other grounds, and the Court declined to pass upon the correctness of this proposition, which had been asserted by Lord Abinger in charging the jury. The principle of this case was also upheld in Canada.²

309. The Supreme Court of the United States,³ and the Courts of many of the States,⁴ however, hold that the assignee as well as the assignor must have an insurable interest in the life. The reason given for this rule is, that if there be a necessity for an insurable interest by the insured in the life, the same necessity should prevail in respect of an assignee. But it should be remembered, as has been previously stated, that most if not all of the Courts which maintain this doctrine have held life insurance not to be a contract of indemnity, that the interest needed to support the contract need not be pecuniary, and that it need not exist at the loss. It is, therefore, not clear why the contract, in which an interest had once existed, should not be assigned to one without interest.

ren, 101 Mass. 564, there is a dictum that an assignee must have interest, but this is overruled in *Mut. L. Ins. Co. v. Allen*, 138 Mass. 24; *Murphy v. Red*, 64 Miss. 614; *McFarland v. Creath*, 35 Mo. Ap. 112; *St. John v. Am. Mut. L. Ins. Co.*, 2 Duer (N. Y.), 419; *Hogle v. Guardian L. Ins. Co.*, 6 Rob. (N. Y.) 567; *Valton v. Nat. Fund L. Assur. Co.*, 20 N.Y. 32; *Butler v. State Mut. L. Assur. Co.*, 55 Hun (N. Y.), 296; *Eckel v. Renner*, 41 Oh. St. 232; *Cunningham v. Smith*, 70 Pa. St. 450; *Clark v. Allen*, 11 R. I. 439; *Bussinger v. Bank*, 30 N. W. R. 290 (Wis.); 3 Kent's Com. 369, note.

¹ *Wainwright v. Bland*, 1 M. & Rob. 481. See also *N. Y. L. Ins. Co. v. Parent*, 3 Q. L. R. 163; *N. Y. L. Ins. Co. v. Talbot*, 3 Ib. 168.

² *Vesina v. N. Y. L. Ins. Co.*, 3 L. N. (Can.) 322.

³ *Warnock v. Davis*, 104 U. S. 775, approving *Cammack v. Lewis*, 15 Wall. 643.

⁴ *Helmetag v. Miller*, 76 Ala. 183; *Ala. Gold L. Ins. Co. v. Mobile Mut. Ins. Co.*, 81 Ib. 329; *Franklin L. Ins. Co. v. Hazzard*, 41 Ind. 116; *Franklin L. Ins. Co. v. Sefton*, 53 Ind. 380; *Kessler v. Kuhns*, 1 Ind. Ap. 511; *Mo. Val. L. Ins. Co. v. Sturges*, 18 Kan. 93; *Mo. Val. L. Ins. Co. v. McCrum*, 36 Kan. 146; *Adams v. Nat. Mut. Ben. Assur. Co.*, 11 Ins. L. J. 710 (Ky.); *Gilbert v. Moose*, 104 Pa. St. 74; *Downey v. Hoffer*, 110 Pa. St. 109; *Keystone Mut. Beuef. Ass'n v. Norris*, 115 Pa. St. 446; *Schonfield v. Turner*, 75 Tex. 324; *Goldbaum v. Blum*, 79 Tex. 638; *Roller v. Moore*, 86 Va. 512. See *ante*, §§ 4, 183, 307.

310. It is also to be remarked that the authority for this rule seems to depend entirely upon a dictum of Wells, J., in *Stevens v. Warren*,¹ in the Supreme Court of Massachusetts, which that learned Court explained away, or rather repudiated, in *Mut. L. Ins. Co. v. Allen*,² after an elaborate review of the authorities. On page 33 of the report, W. Allen, J., in reference to *Stevens v. Warren*,³ remarked, "We think that decision has been misunderstood," and at page 36, "The general rule laid down in *Stevens v. Warren*, 'that no one can have an insurance upon the life of another unless he has an interest in the continuance of that life,' and from which the inference that an assignee of a party must have an insurable interest seems to have been drawn, we think, is not strictly accurate, or may be misleading. An insurable interest in the assured at the time the policy is taken out is necessary to the validity of the policy; but it is not necessary to the continuance of the insurance that the interest should continue; if the interest should cease the policy would continue, and the insured would then have an insurance without interest."

311. In *Franklin L. Ins. Co. v. Hazzard*,⁴ in Indiana, the Court followed the dictum in *Stevens v. Warren*,⁵ saying, after a copious extract from the same, "after pretty mature consideration we have concluded that the doctrine announced in the case cited from Massachusetts is the true doctrine." And the later case of *Franklin L. Ins. Co. v. Sefton*⁶ followed the rule of this case. In the Supreme Court of the United States, in *Warnock v. Davis*,⁷ the authorities cited by Field, J., in support of his remarks are *Stevens v. Warren*,⁸ *Franklin L. Ins. Co. v. Hazzard*,⁹ and *Cammack v. Lewis*,¹⁰ which last case was cited, however, for a slightly different proposition. In Missouri,¹¹ though the Supreme Court subsequently decided the contrary, one of the lower Courts followed the dictum of *Stevens v. Warren*, citing it, *Franklin L. Ins. Co. v. Hazzard*, and *Warnock v. Davis*.¹² In Kansas, the cases of *Franklin L. Ins. Co. v. Hazzard*,¹³

¹ *Stevens v. Warren*, 101 Mass. 564.

² 138 Ib. 24.

³ *Supra*.

⁴ *Franklin L. Ins. Co. v. Hazzard*, 41 Ind. 116, which was followed by *Franklin L. Ins. Co. v. Sefton*, 53 Ind. 380.

⁵ *Supra*.

⁶ 53 Ind. 380.

⁷ 104 U. S. 775.

⁸ *Supra*.

⁹ *Supra*.

¹⁰ 15 Wall. 643.

¹¹ *Adams v. Nat. Mut. Ben. Ass'n*, 11 Ins. L. J. 710 (Ky.).

¹² *Supra*.

¹³ *Supra*.

and *Franklin L. Ins. Co. v. Sefton*,¹ are the only cases relied on, as authorities on this point, in the leading case on this subject in that State.² In Pennsylvania, in the leading case of *Gilbert v. Moose*,³ and in *Downey v. Hoffer*,⁴ and *Keystone Mut. Benef. Ass'n v. Norris*,⁵ no new authorities are cited. In Texas, in *Price v. Knights of Honor*,⁶ the Court cited as authorities for this point, *Stevens v. Warren*, *Warnock v. Davis*, *Franklin L. Ins. Co. v. Hazzard*, *Franklin L. Ins. Co. v. Sefton*, *Gilbert v. Moose*, *Mo. Val. L. Ins. Co. v. Sturges*,⁷ and stated the reasoning therein was more satisfactory than that given for the opposite rule; and the later case of *Schonfield v. Turner*⁸ followed this. In Alabama, in *Helmetag v. Miller*,⁹ none except the above authorities are relied on.

312. It has also been held that even where the assignee has some interest, if it be clearly a cover for a wager, the assignee cannot recover.¹⁰ But a considerable disproportion between the debt and amount of insurance is not alone necessarily conclusive of fraud. Thus in *Grant v. Kline*,¹¹ where a man who owed his brother-in-law the sum of \$743, a part of which was for premiums on other insurance which he had allowed to lapse, insured his life for the latter for \$3000, and paid the premiums, it was held, on his death within a year, in an action by the administrator to recover the policy money paid by the insurer that under the circumstances there was not such a disproportion between the two amounts as to raise a presumption of a wager, as the sum, with compound interest, might equal the debt during the continuance of the life, and that the fact of death within that time was not material. In *Brown v. Mansus*,¹² an assignment by a father to the mother of his illegitimate child for its support was thought to disclose sufficient interest. Providing a home and care by relatives to a childless woman, living apart from her husband, is sufficient.¹³

¹ *Supra*.

² *Mo. Val. L. Ins. Co. v. Sturges*, 18 Kan. 93. See also *Mo. Val. L. Ins. Co. v. McCrum*, 36 Kan. 146.

³ 104 Pa. St. 74.

⁴ 110 Pa. St. 109.

⁵ 115 Pa. St. 446.

⁶ 68 Tex. 361.

⁷ *Supra*.

⁸ 75 Tex. 324.

⁹ 76 Ala. 183, which was followed

by *Ala. Gold L. Ins. Co. v. Mobile Mut. Ins. Co.*, 81 Ala. 329, citing no authority but *Helmetag v. Miller*, on this point; *Heusner v. Mut. L. Ins. Co.*, 47 Mo. Ap. 336.

¹⁰ *Cammack v. Lewis*, 15 Wall. 643.

¹¹ 115 Pa. St. 618.

¹² 5 Atlan. R. 768 (N. H.).

¹³ *Fitzgerald v. Hart. L. & Annuity Ins. Co.*, 13 Atlan. R. 673 (Conn.).

It has been decided in Pennsylvania that the purchaser for value of the policy, with knowledge of the wager, cannot invoke the aid of the Court to recover from the fraudulent assignor the consideration money paid for the assignment.¹

313. In those States which hold that any interest is sufficient to support a life policy, provided it be not a cover for a wager, it becomes essential to ascertain whether policies assigned to creditors are merely assigned as security for a loan, in which case the surplus will go to the debtor's representatives, or whether they are assigned with the intention that the creditor shall not subsequently account to the debtor's estate, in which latter case the creditor is, of course, entitled to the whole fund, even though it exceed the debt.² The question, as in policies originally taken out by creditors, is, of course, the intention of the contract, and it has been held that the Court will examine the surrounding circumstances to discover what the intent is.³ It has been held, however, that a mortgagor who becomes bankrupt and continues to pay premiums is entitled to repayment of the premiums with interest out of the policy moneys, as they are in the nature of salvage moneys.⁴ In Pennsylvania, one, neither a relative nor creditor, cannot, as beneficiary in a policy taken by one whom the beneficiary had agreed to support and for the object of reimbursement, retain more of the policy moneys than is necessary to reimburse him for actual outlays, though the beneficiary has paid all the premiums, but the balance must go to the estate of the insured.⁵

¹ *Blattenberger v. Holman*, 103 Pa. 575; *Shaak v. Meilly*, 26 W. N. C. (Pa.) St. 555. 569; *Swick v. Home L. Ins. Co.*, 2 Dil.

² See *Holland v. Smith*, 6 Esp. 11; 160 (E. D. Mo.). See *ante*, § 189 *et seq.*

³ *Courtenay v. Wright*, 2 Giff. 337; *Morland v. Isaac*, 20 Beav. 389; *Lea v. Hinton*, 5 DeG. M. & G. 823; *Watson v. Brutton*, *Ellis on Insurance*, 155; *Scot. Un. Ins. Co.*, 1 C. S. C. (2d Ser.) 1203; *Amick v. Butler*, 111 Ind. 578; *Stokes v. Coffey*, 8 Bush (Ky.), 533; *Catland v. Hoyt*, 78 Me. 355; *Wright v. Mut. Benef. L. Ass'n*, 118 N. Y. 237; *Smith v. Packard*, 19 N. H. 575; *Lake v. Brutton*, 8 DeG. M. & G. 440; *Lindsay v. Barmcotte*, 23 Scot. Jur. 315; *Marquess of Queensbury v. Scot. Un. Ins. Co.*, 1 C. S. C. (2d Ser.) 1203; *Ball v. Ball*, 11 Ir. Eq. 370; *Catland v. Hoyt*, 78 Me. 355; *King v. Van Vleck*, 40 Hun (N. Y.), 68.

⁴ *Shearman v. Brit. Empire Mut. L. Assur. Co.*, 14 Eq. Cas. 4.

⁵ *Dungan v. Mut. Ben. L. Ins. Co.*, 46 Md. 469.

314. Besides ascertaining whose the policy is, it is of course essential to learn precisely what debt is intended to be secured. In *De Coursey v. Johnson*,¹ where A. and his wife assigned a policy on A.'s life for her to secure his note, and provided in it for the sale of the policy at public or private sale to pay the note and expenses, it was held this would not include counsel fees. If, at or just after an assignment of a mortgage to a creditor, a policy be assigned, the presumption would be it is for the mortgage debt.² For decisions as to whose the surplus is on assignments, where nothing is said, or where the policy is transferred as collateral generally and there is not an express understanding to authorize the assignee to apply the insurance to any other debt; and for cases arising on the question of what advances were intended to be covered by the deposits of policies for advances, the reader is referred to the cases in the note.³ In New York, on a mortgage of a life policy to secure a note, with a reservation of the right to redeem to "the undersigned or his personal representatives," as the debtor had a reasonable time within which to redeem after the "law day" had passed before a foreclosure sale, which privilege went to his representatives, it was held the mortgagee's acceptance of the policy money on the mortgagor's death, without taking steps to cut off the right to redeem, was a satisfaction of the debt; and this would obviate a resort to redeem on the part of the mortgagor's representatives, and therefore entitled the latter to the surplus of the policy money had and received.⁴ A policy which provided for an avoidance, except to the extent of a *bond fide* interest vested in any other person for a sufficient consideration, was held valid up to the debt where the company itself makes an advance as any third party; for the exception was inserted to make the policy more valuable, and therefore the company must use this security in lieu of other security they might have, as the insured's estate is entitled to the benefit of the exception.⁵ An extremely interesting point arose in *Salt v. Marquess*

¹ 134 Pa. St. 328.

² *Buckley v. Garrett*, 60 Pa. St. 333.

³ See *Ede v. Knowles*, 2 Y. & C. Ch. 172; *Ex parte Whitbread*, 19 Ves. 209; *Ex parte Kensington*, 2 Ves. & B. 79; *Talbot v. Frere*, 9 Ch. D. 568; *Maugham v. Ridley*, 8 L. T. x. s. 309; *Ha-*

selfoot's Est., 13 Eq. Cas. 327. See also *Levy v. Taylor*, 66 Tex. 652.

⁴ *King v. Van Fleck*, 40 Hun (N. Y.), 68.

⁵ *White v. Brit. Empire Mut. L. Assur. Co.*, 7 Eq. Cas. 394.

of Northampton.¹ A. advanced £1000 to B. on the security of a reversionary interest to which B. was entitled, provided the latter should survive C., and the lender insured B.'s life against that of C. in the sum of £34,500 in the lender's office, and provided for premiums down to B.'s death. The reversion was charged with the principal, the premiums, and compound interest, etc. There was a stipulation that if B. should die during the lifetime of C. the lender company should be absolutely entitled to the policy money; and B. did die in C.'s lifetime. The Court held that the stipulation was void, and that B.'s administrator could redeem the policy money; for the contract was that the policy was mortgaged to the lender as security, and was B.'s property, subject to a charge; therefore, in accordance with the equitable doctrine against fettering a mortgagor's right of redemption, B.'s administrator could redeem after deducting any sum due, expenses, etc.

315. Where a contingent interest is assigned to secure in part a debt exceeding the value of the interest, and the assignee insured against the contingency, on the debtor's bankruptcy the sum received must be deducted from the proofs of debt.² And where a debtor procures a policy on his life for a creditor and pays the premiums up to bankruptcy, the value of a paid-up policy on a surrender being *x*, and the cash value of surrender at the bankruptcy *y*, the creditor was held entitled to a dividend from the estate equal to the proofs of debt, less the cash value of the policy as surrendered.³ It has been held in Indiana that an assignee of a life policy, taken as collateral, does not waive the right to the policy by claiming against the decedent's estate, the claim not being a lien on the estate nor enforceable by execution.⁴

In *Kerr's Policy*,⁵ a policy deposited to secure a simple contract debt, without agreement as to interest, the creditor paying the premiums down to the death of the debtor, was held charged with interest at 4*l.* per cent., as well as the debt and premiums.

¹ [1892] A. C. 1; *Marquess of Northampton v. Pollock*, 45 Ch. D. 190.

⁴ *Hight v. Taylor*, 97 Ind. 392.

² *Ex parte Andrews*, 2 Rose, 410. See *Kingsford v. Swinford*, 7 W. R. 663.

⁵ 38 L. J. Ch. 539. See also *Sanderman v. Shepherd*, 15 C. S. C. (1st Ser.) 416.

³ *Re Newland*, 6 Ben. (S. D. N. Y.) 342.

316. It would seem to be immaterial that the debtor never paid the premiums charged to him,¹ as on repayment of the debt the policy would be returned only after a deduction for the premiums paid by the creditor.²

317. When the sale of a contingent or reversionary estate is set aside for an unfair price paid by the vendee, or as an improvident bargain by a youthful heir, the right to the policy money would usually depend upon whether the policy was kept up as a part of the contract, or whether the vendee had kept it up on his own account.³ Where a sale of an equity of redemption in a reversionary interest, belonging to the mortgagor with two policies on his life, was set aside because the price was below its value, and the purchaser had allowed the policies to lapse and substituted a new one, the vendor was allowed to adopt the substituted policy on redeeming.⁴

318. In certain jurisdictions, however, the assignee of a life policy on the debtor's life is only allowed to recover up to the debt and disbursements,⁵ and then the amount of the debt is the only question to consider. Where A. advances money to pay the premiums on a policy on B.'s life, taking the policy as security, in which A.'s wife is made one of the payees, it was held that the latter had no beneficial interest except as trustee for A.'s advances.⁶ In *Crotty v. Un. Mut. L. Ins. Co.*,⁷ where the insurer agreed on B.'s death to pay to "A., his creditor, if living, if not, then to the said B.'s executors," it was held the phrase meant that the creditor should be paid if he was a creditor at B.'s death, and that if a sufficient time had elapsed between the issue of the policy and B.'s death as would warrant an assumption that the debt had been paid, the creditor must show the then existence of his debt. In California, where the holder of a policy deposited as collateral sues, it was held that the insurer cannot raise the question of the debt, for being a mere deposit, the holder may recover as trustee for the insured, and is not a technical assignee.⁸

¹ *Morland v. Isaac*, 20 Beav. 389; *Rison v. Wilkerson*, 3 Sneed (Tenn.), 565.

² *Ib.*

³ See *Bromley v. Smith*, 26 Beav. 644; *Foster v. Roberts*, 7 Jur. n. s. 400; *Pennell v. Millar*, 23 Beav. 172.

⁴ *Nesbitt v. Berridge*, 4 DeG., J. & S. 45.

⁵ *Stoelker v. Thornton*, 88 Ala. 241; *Cawthon v. Perry*, 76 Tex. 383; *Lewy v. Gilliard*, 76 Tex. 400.

⁶ *McDonald v. Humphries*, 19 S. W. 234 (Ark.).

⁷ 144 U. S. 621.

⁸ *Curtiss v. Aetna L. Ins. Co.*, 90 Cal.

319. In those Courts which hold that the assignee must have an insurable interest, it has been held if the insurer voluntarily pays an assignee who does not possess such interest, that the insured's representatives cannot complain, for the policy in such a case is a gift to the assignee, in which the insured's representatives can have no concern.¹ Though some Courts think, on some ground or other of public policy, that if the insurer pays the assignee on a wagering policy, the insured's representative should be entitled to recover the policy money in a suit against such assignee on offering to reimburse the latter for his expenses.² In Michigan, by statute, the representative of the insured takes the proceeds of a wager policy.³ And the representative would have the burden of showing the assignee's title rested on a bet.⁴ But under such circumstances the insured's representative must stand or fall on the insured's title. Thus, where the beneficiary with interest assigns to one without interest, and the insurer pays, the insured's representative cannot recover from the assignee, as the title to the policy would be in the beneficiary, and in any event he alone could recover.⁵ In Kansas, on an assignment of a policy by a beneficiary to one without interest, who, finding at the termination of the life he could not recover, returned the policy to the beneficiary, writing "cancelled" over the assignment, it was held that the assigned policy was void even in the hands of the beneficiary, as the whole transaction was against public policy.⁶ Where the insurer pays voluntarily into Court, in a contest between two assignees, the Federal Court awarded the fund to him whom it considered to have a superior claim on the facts presented.⁷

320. The consideration of an assignment, so far as the insurer is concerned, may be considered to be the promise by the insured or assignee to receive future premiums or to retain those paid, though

¹ *Stoelker v. Thornton*, 88 Ala. 241.

⁵ *Hoffman v. Hoke*, 122 Pa. St. 377.

² See *Gilbert v. Moose*, 104 Pa. St.

⁶ *Mo. Val. L. Ins. Co. v. McCrum*, 36 Kan. 146.

74; *Downey v. Hoffer*, 110 Pa. St. 109;

Ruth v. Katterman, 112 Pa. St. 251;

⁷ See *Garland v. Ins. Co. of N. A.*, 9

Wegman v. Smith, 16 W. N. C. (Pa.)

Brad. (Ill.) 571; *New Eng. M. Ins. Co.*

186; *Stambaugh v. Blake*, 22 W. N.

v. Dewolf, 8 Pick. (Mass.) 56; *Shear-*

C. (Pa.) 407; *Price v. Knights of*

man v. Niag. F. Ins. Co., 46 N. Y. 526;

Honor, 68 Tex. 361; *Cammack v. Lewis*,

Pierce v. Nashua F. Ins. Co., 50 N. H.

15 Wall. 643.

297; *Demill v. Hart. Ins. Co.*, 4 Allen

³ *Smith v. Pinch*, 80 Mich. 332.

(N. B.), 341.

⁴ *Lenig v. Eisenhart*, 127 Pa. St. 59.

See *Shaak v. Meily*, 26 W. N. C. 569.

the point is not very material.¹ On an assignment of a policy in respect of property by way of collateral before a loss, which is in the nature of an assignment of the money due on a future loss, and even where the contract itself is assigned as collateral, whether the insurer assents or not, the assignee would take the policy subject to prior equities.² And so would a payee of a policy who is really an appointee or assignee of the fund receivable on the loss.³ In an assignment after the loss, on the same principle, the assignee would take subject to prior equities.⁴ Where the insurer assents to the assignment, not of the fund, but of the contract on an alienation of the subject-matter of insurance, whereby the assignee's interest in realty ceases, a new contract between the insurer and assignee is created, though subject to the conditions of the original one, and it has been held a prior breach of the assignor, unknown to the assignee, will not prevent a recovery on the policy.⁵ In *Stormes v. Can. Farmers' Mut. Ins. Co.*,⁶ it was held the non-payment of a cash premium note by the original insured in a mutual company, after an assent by the company to the assignment, could not be set up against the assignee, or alienee, the note being current at the assignment, and the assignee not aware of its existence. This conclusion was based on the wording of the Canada Acts relative to mutual companies, though perhaps it may be cited as generally affirmative of the principle. In *Ellis v. State Ins. Co.*,⁷ and *Ins. Co. of N. A. v. Garland*,⁸ the breach of the assignor, which continued

¹ *Conn. Mut. L. Ins. Co. v. Fisher*, 30 Fed. R. 662 (E. D. Mo.).

² See *Bergson v. Builders' Ins. Co.*, 38 Cal. 541; *Merrill v. Farmers' & Meehan. Mut. F. Ins. Co.*, 48 Me. 285; *Barrett v. Un. Mut. F. Ins. Co.*, 7 Cush. (Mass.) 175; *F. Ass'n v. Flourney*, 19 S. W. 793 (Tex.); *Reed v. Mut. F. Ins. Co.*, 54 Vt. 413; *Kanady v. Gorr District Mut. F. Ins. Co.*, 44 U. C. Q. B. 261; *Chisholm v. Provin. Ins. Co.*, 20 U. C. C. P. 11; though apparently *Charleston Ins. G. Trust Co. v. Neve*, 2 McM. (S. C.) 237, is to the contrary.

³ *Bidwell v. St. Louis Floating Dock & Ins. Co.*, 40 Mo. 42; *Venner v. Sun. L. Ins. Co.*, 17 Duv. (Can.) 394.

⁴ *Matthews v. Gen. Mut. Ins. Co.*, 9 La. An. 590; *Bonenfant v. Amer. F. Ins. Co.*, 76 Mich. 653; *Archer v. Merch. & Mfrs. Ins. Co.*, 43 Mo. 434.

⁵ *Garland v. Ins. Co. of N. A.*, 9 Brad. (Ill.) 571; *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507; *Continen. Ins. Co. v. Munns*, 120 Ind. 30; *Barnes v. Un. Mut. F. Ins. Co.*, 51 Me. 110; *Cummings v. Cheshire Mut. F. Ins. Co.*, 55 N. H. 457; *Sherman v. Fair*, 2 Spear (S. C.), 647; *Ellis v. Ins. Co. of N. A.*, 32 Fed. R. 646 (S. D. Iowa). See Ill. *City F. Ins. Co. v. Marks*, 45 Ill. 482.

⁶ 22 U. C. C. P. 75.

⁷ 68 Iowa, 578.

⁸ 108 Ill. 220.

to exist after the assignment, was held to be fatal, on the ground that the assignee took the policy subject to the original conditions, and, therefore, a breach, as an incumbrance, or vacancy, originally caused by the assignor, and which was continued by the assignee, was clearly an avoidance. And when the policy is issued by a mutual company the assignee will be presumed to have the assignor's knowledge of the by-laws, though not incorporated in the policy.¹ But if the policy is void, as, for example, for want of insurable interest or for being *ultra vires*, the insurer's assent to a subsequent assignment will not confirm the contract anew to the assignee; for in such a case there is no contract to pass, and, therefore, nothing to confirm.² The assignee of a life policy obviously takes it subject to prior equities.³

321. In an assignment of a policy in respect of property as collateral, with the insurer's assent, to a pledgee or mortgagee, either with or without the subject, not as an assignment of the contract, but as an assignment of the fund only, there is no doubt that a future breach by the mortgagor or pledgeor will avoid; the contract is not assigned, and one of the parties to it has committed a breach. But where the contract of insurance is itself assigned as collateral to one with an insurable interest, it has been contended that the subsequent breach of the mortgagor or pledgeor will not avoid the policy in the hands of the assignee, on the ground that it is a new contract with a new insurable interest. In *New York, in 'Traders' Ins. Co. v. Robert*,⁴ it was held, on an assignment of the policy to the mortgagee, that the subsequent acts of the mortgagor did not affect the policy in the hands of the mortgagee. After that judgment in his favor the mortgagee foreclosed the mortgage, and the Court restrained the mortgagor from issuing execution against the insurance company to recover the insurance money due the mortgagee

¹ *Miller v. Hillsborough Mut. F. St. Louis Mut. F. Ins. Co.*, 32 Mo. Ap. Ass'n, 42 N. J. Eq. 459; *Burger v.* 302.

Farmers' Mut. Ins. Co., 71 Pa. St. 422.

² *Eastman v. Caroll Co. Mut. F. Ins. Co.* 45 Me. 307; *Merrill v. Farmers' & Mechan. Mut. F. Ins. Co.*, 48 Ib. 285; *Cit. F. Ins., Etc., Co. v. Doll*, 35 Md. 89; *McClusky v. Providence Wash. Ins. Co.*, 126 Mass. 306; *Froehly v. N.*

³ *Mitchell v. Mut. L. Ins. Co.*, cited Bliss on Insurance, § 332; *Scottish Widow's Fund v. Buist*, 3 C. S. C. (4 ser.) 1078; *Scot. Equit. L. Assur. Soc. v. Buist*, 4 C. S. C. (4th ser.) 1076.

⁴ 9 Wend. (N. Y.) 404.

by virtue of the judgment obtained by the mortgagee against it. The judgment against the insurance company in favor of the mortgagee, as assignee of the policy, was unappealed from, but the stay of execution was appealed from and the order to stay was reversed in the Court of Errors and Appeals.¹ In delivering the opinion, Senator Edwards said, "Both parties have submitted to the correctness of the judgment of affirmance of the Supreme Court,² and as neither of them had brought a writ of error upon that judgment it cannot be reviewed by this Court. We are to consider it what the records of the Supreme Court showed it to be, a valid judgment." But while the judgment of the case of *Traders' Ins. Co. v. Robert* was not reversed, the principles upon which it rested apparently were; as on the assumption that the judgment unappealed from was valid, the Court of Errors, reversing the other judgment of the Supreme Court, allowed execution to issue by the mortgagor, while in the Supreme Court the Chief Justice had expressly stated the mortgagor had no interest in the policy.³ *Tillou v. Kingston Mut. Ins. Co.*⁴ followed the principle of the *Traders' Ins. Co. v. Robert*, and what is considered to be that of the second case of *Robert v. Traders' Ins. Co.* But in *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.*, the doctrine of *Tillou v. Kingston Mut. Ins. Co.* and *Traders' Ins. Co. v. Robert* was entirely repudiated, the Court holding that the mortgagee, who was assignee, was affected by the acts of the mortgagor in breach of the conditions of the policy subsequent to the assignment, as there was no contract with the assignee. It follows, then, that the dicta of the Judges and the decisions in the lower Courts of New York, which were rendered between *Traders' Ins. Co. v. Robert*, and *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.*, and which followed the principle of the former case, are no longer authorities in that State.⁵

¹ *Robert v. Traders' Ins. Co.*, 17 Wend. (N. Y.) 631.

² *I. e.*, in *Traders' Ins. Co. v. Robert*, 9 Wend. (N. Y.) 404.

³ See remarks of Pratt, J., in *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.*, 17 N. Y. 401.

⁴ 5 N. Y. 405.

⁵ 17 N. Y. 401. See also *Grosvenor v. Atlantic F. Ins. Co.*, 17 N. Y. 391.

⁶ See *Boynton v. Clinton & Essex Mut. Ins. Co.*, 16 Barb. (N. Y.) 254; *Allen v. Hudson River Mut. Ins. Co.*, 19 Ib. 442; *Conover v. Mut. Ins. Co.*, 1 Com. (N. Y.) 290; *Murdock v. Chennango Co. Mut. Ins. Co.*, 2 Ib. 210.

322. In Illinois,¹ Minnesota,² Pennsylvania,³ Rhode Island,⁴ Texas,⁵ Wisconsin,⁶ the Federal Court,⁷ and possibly Georgia,⁸ the rule of the modern New York cases prevails. In Canada, under the more recent legislation the subsequent breach of the mortgagor apparently will avoid a policy assigned with the insurer's assent.⁹ Though it was held before this legislation took place that the grantee of the mortgage and policy, with the insurer's assent, under the statutes then existing, would be unaffected by the future breach of the mortgagor.¹⁰ In Massachusetts, in *Foster v. Equitable Mut. F. Ins. Co.*,¹¹ *Tillou v. Kingston Mut. Ins. Co.* was cited with approval, and the mortgagee was held unaffected by the mortgagor's acts, where the mortgagee on the assignment gave a written promise to pay the future assessments, and agreed that the property should be subject to the same lien for assessments as before. But in *Edes v. Hamilton Mut. Ins. Co.*,¹² a subsequent breach on the part of the mortgagor was held to avoid where the assignee had made no new engagement, as in the preceding case, with the insurer. In Maine,¹³ New Hampshire,¹⁴

¹ *Ill. Mut. F. Ins. Co. v. Fix*, 53 Ill. 151, distinguishing *New Eng. F. & M. Ins. Co. v. Wetmore*, 32 Ill. 221, which cites *Tillou v. Kingston Mut. Ins. Co.*, *supra*, and contains certainly a dictum to the contrary. See also *Home Mut. F. Ins. Co. v. Hauslein*, 60 Ill. 521.

² *Newman v. Home Ins. Co.*, 20 Minn. 422.

³ *State Mut. F. Ins. Co. v. Roberts*, 31 Pa. St. 438, repudiating the older New York authorities and those of South Carolina; *Lycoming F. Ins. Co. v. Storrs*, 97 Pa. St. 354.

⁴ *Hoxsie v. Providence Mut. F. Ins. Co.*, 6 R. I. 517; *Hazard v. Franklin Mut. F. Ins. Co.*, 7 Ib. 429.

⁵ See *Swenson v. Sun F. Office*, 68 Tex. 461.

⁶ *Pupke v. Resolute F. Ins. Co.*, 17 Wis. 378.

⁷ *Carpenter v. Providence Wash. Ins. Co.*, 16 Pet. 495; *Bilson v. Manf.*

Ins. Co., 7 Amer. L. R. (O. S.) 661; *Friemansdorf v. Watertown Ins. Co.*, 1 Fed. R. 68 (N. D. Ill.).

⁸ *Grant v. Ala. Gold. L. Ins. Co.*, 76 Ga. 575.

⁹ *Mechan. Building, Etc., Soc. v. Gore District Mut. F. Ins. Co.*, 3 Ont. Ap. 151, reversing 40 U. C. Q. B. 220. See *Smith v. Niagara District Mut. Ins. Co.*, 38 U. C. Q. B. 570; *Kanady v. Gore District Mut. F. Ins. Co.*, 44 Ib. 261.

¹⁰ See *Burton v. Gore District Mut. F. Ins. Co.*, 12 U. C. Ch. 156.

¹¹ 2 Gray (Mass.), 216.

¹² 3 Allen (Mass.), 362.

¹³ *Pollard v. Somerset Mut. F. Ins. Co.*, 42 Me. 221; following the New York cases, since overruled.

¹⁴ *Barnes v. Union Mut. F. Ins. Co.*, 45 N. H. 21 citing the above overruled New York cases. See also *Rollins v. Columbian Ins. Co.*, 25 N. H. 200.

and South Carolina,¹ the rule of the older New York decisions is asserted.²

323. In any event, the payee of the policy, being in no sense the assignee of the contract, is affected by the subsequent acts of the insured.³ In Lower Canada, however, the payee apparently is not affected by the subsequent acts of the insured.⁴ Subsequently in Massachusetts, a statute⁵ has been passed to the effect that if a "policy shall be made payable to a mortgagee of the insured's real estate, no act or default of any person other than such mortgagee or his agents or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate." And it has been held that a subsequent conveyance by the mortgagor after he had taken an insurance, loss payable to the mortgagee, may defeat his right to recover, though it does not affect the latter.⁶

324. It frequently occurs that the mortgagee, when payee or assignee, makes a special stipulation with the company so as to protect himself against the acts of the mortgagor, which is valid unless the agreement impairs the mortgagor's contract.⁷ But such an agreement

¹ *Charleston Ins. & Trust Co. v. Neve*, 2 McM. (S. C.) 237, citing *Robert v. Traders' Ins. Co.*, 9 Wend. (N. Y.) 404, 474; 17 lb. 631.

² *Leavitt v. Western M. & F. Ins. Co.*, 7 Rob. (La.) 351.

³ See *F. Ins. Co. v. Felrath*, 77 Ala. 194; *Contin. Ins. Co. v. Hulman*, 92 Ill. 145; *Brunswick Savings Institution v. Commercial Un. Ins. Co.*, 68 Me. 313; *Hale v. Mechan. Mut. F. Ins. Co.*, 6 Gray (Mass.), 169; *Loring v. Manf. Ins. Co.*, 8 Ib. 28; *Franklin Sav. Inst. v. Cent. Mut. F. Ins. Co.*, 119 Mass. 240; *Van Buren v. St. Joseph Co. Vil. F. Ins. Co.*, 28 Mich. 398; *Griswold v. Amer. Cent. Ins. Co.*, 1 Mo. Ap. 97; *Baldwin v. Phoenix Ins. Co.*, 60 N. H. 164; *Martin v. Franklin F. Ins. Co.*, 38 N. J. L. 140; *Warbasse v. Sussex Co. Mut. Ins. Co.*, 42 Ib. 203; *Lattan v. Royal Ins. Co.*, 45 Ib. 453; *State Ins. Co. v. Maakens*, 38 N. J. L. 564; *Hine v. Woolworth*, 93 N. Y. 75; *Merwin v. Star F. Ins. Co.*, 72 N. Y. 603, 7 Hun,

659; *Hine v. Homestead F. Ins. Co.*, 29 Hun (N. Y.), 84; *Flaherty v. Germania F. Ins. Co.*, 1 W. N. C. (Pa.) 352; *Hagaman v. Allemania F. Ins. Co.*, 38 Leg. Int. (Pa.) 375; *Brown v. Roger Williams Ins. Co.*, 5 R. I. 394; *Appleton Iron Co. v. Brit. America Assur. Co.*, 46 Wis. 1; *Gillett v. Liv. & Lond. & Globe Ins. Co.*, 73 Wis. 203; *Carpenter v. Providence Wash. Ins. Co.*, 16 Peters 495; *Friemansdorf v. Watertown Ins. Co.*, 1 Fed. R. 68 (N. D. Ill.); *Humphrey v. Hartford F. Ins. Co.*, 9 Reporter, 106 (N. D. N. Y.); *Omnium Securities Co. v. Can. F. & M. Ins. Co.*, 1 Ont. R. 494; *Livingstone v. West. Ins. Co.*, 16 U. C. Ch. 9; *Cormier v. Ottawa Agricult. Ins. Co.*, 4 P. & B. (N. B.) 526.

⁴ *Black v. Nat. Ins. Co.*, 24 L. Can. Jur. 65. See *Nat. Assur. Co. v. Harris*, 5 Montreal, Q. B. 345.

⁵ Pub. Stat. c. 119, s. 139.

⁶ *Eliot Five Cents, Etc., Bank v. Commercial Un. Assur. Co.*, 142 Mass. 142.

⁷ *Hartford F. Ins. Co. v. Alcott*, 97

must be made before the act of the mortgagor has caused a breach, for otherwise the mortgagee's interest would not be part of the original interest; or, if not, there must be a fresh consideration to support the new promise.¹ Where a policy to a mortgagee as payee provides that the mortgagee's interest shall not be affected by an alienation, etc., if the assignment of a mortgage by the mortgagee with the interest in the policy to the alienee of the fee should create a merger, the debt being extinguished, the alienee could not recover on the policy.² Where a clause, as the above, existed, but the mortgagee was to notify of any known increase of hazard, the knowledge of a breach by the broker who acted for the insured and payee will be imputed to both.³ Where the policy, payable to the mortgagee, was to be good notwithstanding the mortgagor's alienation, but was made forfeitable for failure to pay assessments, which the mortgagee undertook to pay if on demand the mortgagor should fail to do so, it was held the mortgagee could recover, though the policy as regards the mortgagor had become forfeited through a failure to pay the assessment; on the ground that the clause of forfeiture for non-paying of assessments only applied to the mortgagor, and that the mortgagee was evidently intended to be responsible for him, as the policy was designed to protect the mortgagee.⁴ The payee, who is mortgagee, is protected on the mortgagor's failure to offer proof of loss within the proper time, or to pay a note, under the words "no act or neglect" of the mortgagor shall prejudice the mortgagee.⁵ Under a similar clause in a policy payable to a trustee of the mortgage, the taking of subsequent insurances by the mortgagor with *pro rata* clauses cannot affect the trustee.⁶ Where a policy had the subrogation clause in favor of the insurer, and was indisputable as to the mortgagee as to the breaches of the mortgagor, it was held, after a loss and the assignment to the insurer of the mortgage debt, that the insurer can set up as against the

Ill. 441; Ulster Co. Saving Inst. v. Leake, 73 N. Y. 161; Springfield F. & M. Ins. Co. v. Brown, 1 Ins. L. J. 57 (N. Y.).

¹ Davis v. German Amer. Ins. Co., 135 Mass. 251.

² Macomber v. Cambridge Mut. F. Ins. Co., 8 Cush. (Mass.) 133; Lett v. Guardian F. Ins. Co., 52 Hun (N. Y.), 570.

³ Cole v. Germania F. Ins. Co., 99 N. Y. 36.

⁴ Francis v. Butler Mut. F. Ins. Co., 7 R. I. 159.

⁵ Anderson v. Saugeen Mut. F. Ins. Co., 18 Ont. R. 355.

⁶ Hartford F. Ins. Co. v. Olcott, 97 Ill. 439.

mortgagor his breach, on a tender by the latter of the mortgage debt, less the amount of the policy money.¹

325. If on an alienation of the subject of the insurance the policy is assigned with the insurer's assent, a novation is established, and the future acts of the alienor will not affect the new insurance. A breach by the payee or assignee is not a breach of the insured, and therefore will not necessarily avoid the insurance.² Thus, a clause against incumbrances on the part of the applicant does not apply to the payee.³ But a clause against foreclosure proceedings applies to those commenced by the payee mortgagee.⁴

326. The policy is often assigned coupled with certain conditions to be performed by the assignee as to the appropriation of the surplus of the policy money. The transfer by a debtor of his interest in a policy to a creditor as security for a loan, reserving the right to redeem during his life on payment of the loan with interest, but on death to be absolute, was held legal.⁵ A promise by the assignee of a life policy to pay a debt due by the assignor to a third party is not within the Statute of Frauds, as it is simply a promise to pay the assignee's own debt to a nominee of the assignor.⁶ But in Pennsylvania a wife is not bound by an agreement signed during coverture before the Act of 3d June, 1887, for another appropriation of a policy on the husband's life assigned to her.⁷

327. The assignee must fulfil the conditions of the contract of assignment or trust under which he lays claim to the policy money.⁸ It has been held the duty of a trustee, who has been paid the insurance on a life policy assigned as security for a debt, to hold such proceeds of the policy till the debt matures, unless the deed provides otherwise.⁹ Where a life policy is assigned absolutely to a creditor, with the direction to pay the surplus for the wife's use, even if regarded as a mortgage, the wife, in the absence of other

¹ *Howes v. Dominion F. & M. Ins. Co.*, 8 Ont. Ap. 644.

² *Breckinridge v. Amer. Cent. Ins. Co.*, 87 Mo. 62; *Perry v. Mechan. Mut. Ins. Co.*, 11 Fed. R. 478 (D. R. I.).

³ *Richardson v. Can. West Farmers' Mut. & Stock Ins. Co.*, 16 U. C. C. P. 430.

⁴ *Titus v. Glen's Falls Ins. Co.*, 81 N. Y. 410.

⁵ *Edington v. Aetna L. Ins. Co.*, 13 Hun (N. Y.), 543.

⁶ *Leake v. Ball*, 116 Ind. 214.

⁷ *Love v. Love*, 22 W. N. C. (Pa.) 119.

⁸ *Hutchings v. Miner*, 46 N. Y. 456; *Kingdom v. Castleman*, 4 L. J. Ch. 448.

⁹ *Fergus v. Wilmarth*, 17 Brad. (Ill.) 98.

creditors, will take as against the husband's administrator.¹ And a direction to pay for the sole use of the wife, where regarded as a trust, it was held will vest the residue absolutely in the wife.² An assignment of a life policy to secure a certain loan to a creditor, who agreed to make a suitable settlement on the insured's death to the latter's representatives, followed by other similar assignments the last of which was a transfer to the creditor of the absolute interest in the policy, was held to mean that the creditor should be appointed on the insured's death to receive the money, and after reimbursing himself to the extent of his loans to pay the balance to the persons thereunto entitled.³

328. It has been held that the insurer, unless there is a proviso to that effect, cannot terminate the insurance with the payee's assent alone.⁴ Nor can the pledgeor surrender so long as the debt for which the policy is pledged remains unsatisfied.⁵ Where a debtor pledged a policy to secure a loan, which the pledgee, after keeping up for some time, surrendered to the insurer for its surrender value, it was held, on a bill to redeem the policy money and to recover the policy, that a tender made by the insured to the insurer could not restore the policy without a tender to the pledgee of the debt due.⁶ Where a debtor, who had executed a mortgage to secure a surety insured for the benefit of the mortgagee, aliened the property subject to the mortgage, and the purchaser wrongfully surrendered the policy and took a new one for himself, the Court in a suit by the mortgagee against the purchaser and the company applied the insurance money to the mortgage debt, but the note and mortgage were ordered to be given up and released.⁷ In *Miall v. West. Ins. Co.*,⁸ a policy was assigned to one not interested in the property, and before the loss was substituted by the agreement of the insurer and assignor for another; in a suit against the insurer by the assignee, the fact that the assignee was not interested in the property, and therefore could not sue at law, was held a good equitable defence, and perhaps a good defence at law; the Court observing that the assignee would

¹ *Harrison v. McConkey*, 1 Md. Ch. 34.

² *Grenville v. Crawford*, 13 Ga. 355.

³ *Page v. Burnstine*, 102 U. S. 664.

⁴ *Lattan v. Royal Ins. Co.*, 45 N. J. L. 453; *Reid v. McCrum*, 91 N. Y. 412.

⁵ *Conway v. Britannia L. Ins. Co.*, 8 L. Can. J. 162.

⁶ *Dungan v. Mut. Benef. L. Ins. Co.*, 46 Md. 469.

⁷ *Miller v. Aldrich*, 31 Mich. 408.

⁸ 19 U. C. C. P. 270.

not be prejudiced, for if he had any interest as against the assignor under the first policy, equity would attach it to the substituted one. The pledgee or mortgagee of the policy cannot procure its cancellation without the insured's assent.¹ It is true that a mortgagee of a life policy may surrender it for its reserve or equitable value, as an advantageous mode of foreclosure, but he must give notice to redeem before surrender, and without such notice the purchaser or company would only acquire the interest of the mortgagee and hold subject to the right of redemption.² The company would be affected by misstatements of the mortgagee on a surrender of a policy by way of foreclosure, and, if improperly made as respects the interest of the mortgagor, is still liable to the mortgagor; for the surrender value only represents the price the insurer pays for the mortgaged policy, and the insurer only takes what right the mortgagee happened to have.³ Where in a policy to A. a clause provided that "the owner of the building being also holder of the policy" may cancel it, and A. executed a mortgage and assigned a policy to the insurance company as collateral, and then sold the property and assigned the policy subject to the first assignment to the purchaser, it was held that the option to cancel the policy passed as part of the collateral to the company, and the terre-tenant had no right to cancel, and therefore there could be no set off of the option or return of the unearned premium against the mortgage debt.⁴

329. The question who shall keep the policy on foot, as between the insured and the assignee, depends obviously on the terms of the assignment. When nothing is said it is apparently the duty of the insured to pay the premiums.⁵ And the fact that the insurer is bailee of the policy does not alter the rule.⁶ If the debtor refuse, the creditor may do so and be reimbursed.⁷ And if the mortgagee do so this does not destroy the equity in the mortgagor to redeem.⁸ The English Act of Bankruptcy of 1861, s. 154, discharges the

¹ *Re Moore*, 6 Daly (N. Y.), 541; 624; *Grant v. Ala. Gold L. Ins. Co.*, 76 Ga. 575; *Dungan v. Mut. Ben. L. Ins. Co.*, 46 Ind. 469; *Vandueren v. Scallan*, 7 Bull. (Oh.) 188.

² *Dungan v. Mut. Ben. L. Ins. Co.*, 46 Md. 469.

³ *Ib.*

⁴ *Fogerty v. Phila., Etc., Ins. Co.*, 75 Pa. St. 125.

⁵ See *Solomon v. Isaacs*, 27 L. T. n. s.

⁶ *Howard, adm., v. Mut. Ben. L. Ins. Co.*, 6 Mo. Ap. 577.

⁷ *Dungan v. Mut. Ben. L. Ins. Co.*, 46 Md. 469.

⁸ *Ib.*

bankrupt from an obligation to pay premiums on a policy becoming due subsequent to the date of the adjudication.¹ In Canada, it was held that an insolvent, after an assignment, could continue to pay renewal premiums on a policy on property, though it might or might not belong to his estate; though probably the payment and receipt would enure to his estate unless he assigned in a way distinct from the statutory way.²

In *Beresford v. Beresford*,³ the Court authorized on the husband's insolvency the surrender of policies which he had covenanted to keep up. Where a settlement for a wife, with remainder to the issue, included a policy on the life of the *cestui que vie* of an annuity, which annuity formed part of the trust, without directions as to payment of premiums, it was held that the trustee could keep the policy up out of the wife's estate, and that no lien would be created in her favor for the amounts so paid.⁴ In *Ainsworth v. Backus*,⁵ where a married woman assigned a life policy on her husband's life to A., who promised to keep it up, on the condition that he should get sixty per cent. of the proceeds, it was held he was bound to keep it up whether the assignment was voidable or not, and the fact that the married woman's husband was alive was no bar to the action. In *Browne v. Price*,⁶ a borrower gave as security to an insurance company a demise of the borrower's life interest in certain property, together with a conveyance of a reversion in fee, with a policy payable on the borrower's death "in case he should leave male issue by his then present wife living at his death," and agreed to keep on foot the policy. In case of his neglect to do so the lender was empowered to do so and charge payments on the hereditaments, but there was no covenant to repay the lender the premiums he might pay. The borrower paid premiums till his wife was past the child-bearing age, and afterwards the insurance company placed premiums to its credit in its "Policy Premiums Account," and regularly debited them to the mortgage account, which, however, the borrower was ignorant of. In an action of covenant to repay the premiums, there being no loss on the debt, it was held the insurer

¹ *Saunders v. Best*, 17 C. B. N. S. 731. *Trenery*, Ib. 16; *Hobday v. Peters*, 28 Ib. 603.

² *Dickson v. Provincial Ins. Co.*, 24 U. C. C. P. 157.

⁴ *Darcy v. Croft*, 9 Ir. Ch. 19.

⁵ 5 Hun (N. Y.), 414.

³ 23 Beav. 292. See also *Hill v.*

⁶ 4 C. B. N. S. 578.

could recover one shilling; for the contract allowed the insurer, on the borrower's default, to proceed in a particular way, which he had not chosen to do. Where there are no funds to keep the life policies up they may be sold by the mortgagee.¹ It has been held an assignee in bankruptcy should discontinue an existing life policy, or only hold it during settlement of the estate so as to get its surrender value.²

330. The liability of the insured or his assignee to the insurer for assessments in a mutual company will depend upon the contract made by the insurer with the assignee on the assignment. When the insurer recognizes the assignee as a new member in place of the assignor, of course the assignee is liable.³ But if the policy is only assigned as collateral, and the original member still regarded as bound by his contract, he must pay.⁴ In *New Hamp. F. Ins. Co. v. Hunt*,⁵ the assignee agreed to pay the assessments subsequent to the assignment, and the insurer consented; on an assessment the surety of the assignor paid up to the date of the assignment, and gave the note up to the company; held that the assignee was still liable, as he was not a party to the agreement between the surety and the insurer, and the note was not necessary to be made by the assignee, as the latter had made a separate agreement with the insurer.

In the Mutual Assurance Society of Virginia, the contributions consisted of premiums, quotas, and additional premiums, of which the premium was paid at the insurance; in case of default the sale of the property was authorized, and was originally designed to raise a fund for making immediate compensation to members. The quotas were intended to supply any deficiency, and were substantially additional assessments on the property insured, and a lien for the quotas was given which permitted a sale therefor in the hands of the subscribers and also in the hands of an alienee or mortgagee, who were created members. The additional premium was for the increase of value or hazard shown by a revaluation made at stated

¹ *Ford v. Tynte*, 41 L. J. Ch. 758.

² *Re McKinney*, 15 Fed. R. 535 (S. D. N. Y.)

³ *Commw. v. Mass. Mut. F. Ins. Co.*, 112 Mass. 116; *Cumings v. Hildreth*, 117 Mass. 309; *Bowditch Mut. F. Ins. Co. v. Buffum*, 2 Gray (Mass.), 550;

Barnes v. Un. Mut. F. Ins. Co., 45 N.

H. 21; *Brannin v. Mercer Co. Mut. Ins. Co.*, 4 Dutch. (N. J.) 92; *Mut. F. Ins. Co. v. Galiput*, 3 L. N. (Can.) 239.

⁴ *Cumings v. Hildreth*, 117 Mass. 309.

⁵ 30 N. H. 219.

periods, or at the instance of members, which was also a lien and every owner of a freehold becomes a member. Therefore, on the death of a husband insured the widow takes her dower subject to the lien, but incurs no personal responsibility till the dower is assigned, when she becomes a member, the heirs being personally liable till that event takes place.¹

331. After a policy is made payable or assigned to a creditor, it has been held the insurer cannot adjust the loss or make an agreement as to arbitration which will bind the payee or assignee, unless he consents.² Where a trustee of a policy, by a fair construction, can give receipts, the company should pay.³ Where a feme covert had insured and her husband mortgaged a policy to B., it was held the insurer, in an action by the latter, could move to bring the husband before the Court to join B. in a receipt, when the latter had a power of attorney, but there was no clause as to receipts.⁴ In England, where a policy was deposited with B. by A., who directed to have an assignment prepared, which was not done, and on A. dying insolvent, the company's refusal to pay till A.'s representative would give a release, as the debt was admitted (though no administration was yet taken out), and though B. had offered indemnity, was held justifiable; for the letter and deposit were not an equitable assignment within the Policies Act,⁵ and the company could take the indemnity, but was not compelled to.⁶ It was held in *Ford v. Ryan*,⁷ where the trustee of a policy assigned on trusts has no authority under the deed to give receipts, that the insurer need not see to the application of the sum assigned, and a payment to the trustee will protect the insurer. It was held in *Caplice v. Kelly*,⁸ that the assignor of a policy for value can only recover the expenses he is put to for giving a release when the insurer is willing to pay on

¹ *Shirley v. Mut. Assur. Soc.* 2 Rob. (Va.) 705.

² *Amer. Cent. Ins. Co. v. Sweetzer*, 116 Ind. 370; *Harrington v. Fitchburg Mut. F. Ins. Co.*, 124 Mass. 126; *Hall v. F. Ass'n*, 64 N. H. 405; *Brown v. Roger Williams Ins. Co.*, 5 R. I. 394; *Brown v. Hart. F. Ins. Co.*, 21 L. Rep. 726 (D. R. I.); *F. Ass'n v. Blum*, 63 Tex. 282.

³ *Curtin v. Jellicoe*, 13 Ir. Ch. R. 180.

⁴ *Tench v. Eykyn*, L. R. 18 Ir. 45.

⁵ Act of 1867, s. 6.

⁶ *Crossley v. City of Glasgow L. Assur. Co.*, 4 Ch. D. 421.

⁷ 4 Ir. Ch. 342.

⁸ 11 Ins. L. J. 272 (Kan.).

such release; for a hard bargain driven by the assignor as a consideration for giving a release, will not be sustained.

332. It may be added that an assignment of a policy as security for a debt, with a proviso for redemption, has, in England, been held a mortgage within the Act of 55 Geo. III., c. 184, and requires an *ad valorem* stamp.¹ And a conveyance or assignment by way of a *bona fide* sale does not create a succession within the meaning of the Succession Duty Act (16 & 17 Vict. 51).² In Scotland, where an heir presumptive had given valuable consideration for the assignation of policies of insurance, in consenting to the disential and allowing the debt to be charged on the estate, no succession tax duty was held exigible, because it was not a gratuitous assignation in the sense of the statute.³

333. Where the law of the domicile of the insurance office differs as to the validity of assignment from the law of the place of contract, the latter probably will govern.⁴ For example, the right of a married woman to assign for use of creditors of husband or in a particular way, etc., will depend upon the law of the place where the contract of assignment is made and is to be performed.⁵ In New York also it was held to be immaterial whether a policy could or could not be assigned to one without interest in the State where the home office was, as the contract of assignment should be construed by the laws of the State where it was made.⁶ In any event, the law of the home office *primâ facie* is the same as that of the place of the assignment.⁷

¹ Caldwell v. Dawson, 5 Exch. 1.

² Fryer v. Morland, 3 Ch. D. 675.

³ Lord Advocate v. Earl of Fife, 21 Scott. L. R. 151.

⁴ Conn. Mut. L. Ins. Co. v. Westervelt, 52 Conn. 586.

⁵ See Lee v. Abdy, 17 Q. B. D. 309; Mut. L. Ins. Co. v. Allen, 138 Mass. 24; Newcomb v. Mut. L. Ins. Co., 9 Ins. L. J. 124 (Mass.); Mut. Benef. L. Ins. Co. v. Wayne Savings Bank, 68 Mich. 116;

Barry v. Equit. L. Ins. Co., 59 N. Y.

587; Newcomb v. Mut. L. Ins. Co., 9

Ins. L. J. 124 (D. Mass.); Timayenis

v. Un. Mut. L. Ins. Co., 21 Fed. R.

223 (S. D. N. Y.); Toronto General

Trusts Co. v. Sewell, 17 Ont. R. 442;

Guggisberg v. Waterloo Mut. F. Ins.

Co., 24 Grant Ch. (Can.) 350.

⁶ Cannon v. Northw. Mut. L. Ins.

Co., 29 Hun. (N. Y.) 470.

⁷ Ib.

CHAPTER IV.

CANCELLATION AND RENEWAL OF THE POLICY.

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DIVISION I.—CANCELLATION.

334. The insured's right to cancel, so far as the beneficiary under a life policy, and the pledgee or creditor under a policy in respect of property and life, are concerned, has been discussed under the head of Assignment.¹ It is now proposed to discuss his right to cancel as respects the insurer.

¹ See *ante*, § 285 *et seq.*, and § 328 *et seq.*

It is usual to insert in the policy a right in either party to terminate its existence before the time specified in the contract for its continuance. But to effect a cancellation it is not necessary that such a provision should exist in the policy, for the parties may, equally well, outside the policy agree to cancel.¹ In the absence, however, of an agreement in the policy or otherwise between the parties, the right to cancel will not be presumed.² Where the right to cancel is regulated by statute, the contract in the policy, or the right to cancel will depend on the wording of the statute.³

335. Where the insured does not personally cancel, the authority of one who undertakes to cancel for him must be established.⁴ It may be laid down as a general rule that the broker or other special agent employed to procure the policy for the insured has not an implied authority to cancel.⁵ And a husband procuring a policy for his wife is not impliedly authorized to surrender without her consent.⁶ The fact that the agent who procured or issued the policy happens to be an agent of a particular insurance company as well as of other insurance companies does not impliedly authorize him to cancel an existing policy in one company and issue another in a second company without the authority of the insured, either expressly, previous to the cancellation, or impliedly, by ratification.⁷

¹ *Rothschild v. Amer. Cent. Ins. Co.*, 74 Mo. 41; *Boland v. Whitman*, 33 Ind. 64; *Akers v. Hite*, 94 Pa. St. 394; *Kirby v. Phoenix Ins. Co.*, 13 Lea (Tenn.), 340.

² *Rothschild v. Amer. Cent. Ins. Co.*, 74 Mo. 41.

³ *Colby v. Cedar Rapids Ins. Co.*, 13 Ins. L. J. 841 (Iowa). See *Joshua Hendy, Etc., v. Amer. Steam Boiler Ins. Co.*, 86 Cal. 248.

⁴ *Von Wein v. Icot, Etc., Ins. Co.*, 22 J. & S. (N. Y.) 276; *Marsh v. Northw. Nat. Ins. Co.*, 3 Biss. 351 (E. D. Wis.). See *Clarke v. Un. F. Ins. Co.*, 6 Ont. R. 635.

⁵ *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566; *Broadwater v. Lion F. Ins. Co.*, 34 Minn. 464; *Lange v. Lycom. F. Ins. Co.*, 3 Mo. Ap. 591; *Rothschild v. Amer. Cent. Ins. Co.*, 74 Mo. 41;

Stilwell v. Mut. L. Ins. Co., 72 N. Y. 385; *Hermann v. Niag. F. Ins. Co.*, 100 N. Y. 411; *Von Wien v. Scot. F., Etc., Ins. Co.*, 22 J. & S. (N. Y.) 276; *Hodge v. Security Ins. Co.* 33 Hun (N. Y.), 583; *Body v. Hartford F. Ins. Co.* 63 Wis. 157; *Adams v. Mfrs. & Builders' F. Ins. Co.*, 17 Fed. R. 630 (D. R. J.). See also *Latoix v. Germania Ins. Co.*, 27 La. An. 113.

⁶ *Stilwell v. Mut. L. Ins. Co.*, 72 N. Y. 385; *Whitehead v. N. Y. L. Ins. Co.*, 102 N. Y. 143.

⁷ See *Mackie v. European Assur. Soc.*, 21 L. T. r. s. 102; *New Orleans Ins. Ass'n v. Boniel*, 20 Fla. 815; *Wilson v. N. H. F. Ins. Co.*, 5 N. East. R. 818 (Mass.); *Stebbins v. Lancash. Ins. Co.*, 60 N. H. 65; *Ellis v. Albany City F. Ins. Co.*, 50 N. Y. 402; *Sargent v. Nat. F. Ins. Co.*, 10 Ins. L. J. 852 (N. Y.);

Nor does the mere fact of his position as agent of both companies and of the insured likewise raise the presumption of authority.¹ A custom to show that the agency of the broker of the insured continued down to date of cancellation has been held not admissible in the absence of evidence that the insured was aware of the custom.² But a general agent of the insured in the matter of insurance would have authority to cancel.³ And one employed by the insured to procure, modify, or cancel policies must be regarded as a general agent.⁴ So where a wife leaves all her business to her husband, who without her knowledge insures his life for her, and keeps on foot the policy out of his own money, he would have implied authority on the company's embarrassment to bind her by an agreement in her name to a reduction in the amount of insurance.⁵ A partner may consent to a cancellation of a policy on his firm's property,⁶ though a joint tenant cannot.⁷ The mere receipt of a policy, substituted by an agent for a former policy, without objection, will not amount to a ratification, where the fact of substitution was unknown to the insured, or the facts were misrepresented.⁸ A cheque for a return premium indorsed by a lady, at her husband's request, is not proof of ratification of the cancellation of her policy, where she did not know what it was for.⁹ And if she was informed of it, but did not notify the company till after the death of the insured of her dissent, owing to being required to attend the insured in his last sickness, this was held not to be a ratification of the cancellation.¹⁰ A man who had procured

Lancash. Ins. Co. v. Nill, 114 Pa. St. 248; *Whiteman v. Amer. Cent. Ins. Co.*, 14 Lea (Tenn.), 327; *Fitton v. F. Ins. Ass'n*, 20 Fed. R. (D. Vt.) 766; *Inbusch v. Northw. Nat. Ins. Co.*, 4 Ins. L. J. 545 (Wis.); *Moore v. Gore Dist. Mut. F. Ins. Co.*, 14 Ont. Ap. 582.

¹ *Lancash. Ins. Co. v. Nill*, 114 Pa. St. 248.

² *Hernann v. Niagara F. Ins. Co.*, 100 N. Y. 411; *Hodge v. Security Ins. Co.*, 33 Hun (N. Y.), 583; *Adams v. Mfrs. & Builders' F. Ins. Co.*, 17 Fed. R. 630 (D. R. I.).

³ *McCartney v. State Ins. Co.*, 33 Mo.

Ap. 652; *Standard Oil Co. v. Triumph Ins. Co.*, 5 Ins. L. J. 594 (N. Y.)

⁴ *Standard Oil Co. v. Triumph Ins. Co.*, *supra*.

⁵ *Singer v. Charter Oak Ins. Co.*, 22 Fed. R. 774 (E. D. Mo.).

⁶ *Hillock v. Traders' Ins. Co.*, 54 Mich. 531.

⁷ See *Clarke v. Un. F. Ins. Co.*, 6 Ont. R. 635.

⁸ *Ins. Cos. v. Raden*, 87 Ala. 311; *Bennett v. City Ins. Co.*, 115 Mass. 241.

⁹ *Stilwell v. Mut. L. Ins. Co.*, 72 N. Y. 385.

¹⁰ *Stilwell Mut. L. Ins. Co.*, 72 N. Y. 385.

a valid existing policy to be cancelled was held substituted as insurer.¹

336. The prerequisites to cancellation imposed upon the insured as to surrender of the policy, etc., must be followed.² Where a cancellation is allowed by the policy, it usually provides for notice to the insurer. Therefore a mere election to cancel, and an assignment of the unearned premium to a third party is insufficient without notice to the company; and the assignee can not take the money, where after the assignment, but before notice of the cancellation, the policy has become forfeited from some cause.³ If the insured must notify the insurer, he must show that the notice was received by an authorized agent. Notice to one who has been frequently permitted by the insurer to cancel would be sufficient.⁴ But notice to a soliciting agent usually is not sufficient.⁵

337. Where policies are issued by a general agent on agreement that he should cancel others, if this is not done they will not take effect, though the policies contained a clause that the agent shall not bind the company by a promise, for as the policies were not to attach, except on a condition which was not performed, the agent's agreement to surrender was a nullity.⁶ Where the insured proposes to an agent to substitute a new policy in the place of an existing one, which he authorizes him to cancel on the substitution, the proposal is entire; and the cancellation of the old policy without the substitution of the new one is not binding.⁷ In New York, an insured intended and directed the company's agent to cancel a certain policy, but by mistake sent a wrong policy; on being notified of his error, he undertook to send the proper one, and it was agreed on its receipt that the policy improperly sent should be given back. In the meantime the policy intended to be cancelled was marked off by the insurer; and the court held that the policy intended to be cancelled was cancelled, for the insured intended its cancellation, and

¹ *Gray v. Murray*, 3 John. Ch. (N. Y.) 167. See also *Murray v. Robinson*, 7 Alb. L. J. 415.

² *Schroeder v. Farmers' Mut. F. Ins. Co.*, 87 Mich. 310.

³ *Colby v. Cedar Rapids Ins. Co.*, 66 Iowa, 577.

⁴ *Train v. Holland Purchase Ins. Co.*, 62 N. Y. 598.

⁵ *Buckley v. Columb. Ins. Co.*, 83 Pa. 298; *Susquehanna Mut. F. Ins. Co. v. Swank*, 102 Pa. St. 17.

⁶ *Harnickell v. N. Y. L. Ins. Co.*, 40 Hun (N. Y.), 558.

⁷ *Poor v. Hudson Ins. Co.*, 2 Fed. R. 432 (D. N. H.).

made a mistake in sending the wrong one, and this the Court could rectify under the practice of that State.¹

338. When an absolute right to cancel exists in the policy, the insured's cancellation need not be accepted by the insurer.² But an agreement to cancel outside the policy must be clear³ and mutual.⁴ The retention for two months of a policy sent for cancellation has been held to imply an assent.⁵ An executory agreement to cancel is not sufficient, if before its cancellation other rights have intervened.⁶ Where the holder of a policy refused to pay a premium note when due, and declared "he would not have any thing more to do with the insurers and abandon the whole thing," but retained the policy, and the insurers retained the note, and did not appear to assent to the abandonment, it was held the policy remained in force.⁷ Where the insured proposes to the insurer to cancel his policy and issue a new one, the proposal is conditional and entire, and unless the new one is issued the old policy cannot be cancelled.⁸ Where a general agent ordered a local agent to cancel, sending him a card of cancellation, which the latter sent to the insured, stating an earned premium was in his hand subject to his order, but before the letter arrived the local agent saw the insured and told him of its contents, but not to mind it, as he would carry the risk till he heard from him, and later the insured directed him to transfer the policy to another company, which was not done; it was held on a subsequent loss that there had not been a cancellation, for the direction to transfer the policy did not operate as an acceptance by the insured of the cancellation, nor did it constitute the local agent agent for this purpose; nor was it a disposal of the premium money in the agent's hands, the direction not being acted upon.⁹ Under an arrangement, that upon surrendering the

¹ *Von Wien v. Scot. Un. & Nat. Ins. Co.*, 118 N. Y. 94.

² *Crown Point Iron Co. v. Aetna Ins. Co.*, 53 Hun (N. Y.), 220.

³ *Candee v. Cit. Ins. Co.*, 4 Fed. R. 143 (D. Conn.).

⁴ *Head v. Providence Ins. Co.*, 2 Cranch. 127; *Clarke v. Un. F. Ins. Co.*, 6 Ont. 635.

⁵ *Walters v. St. Joseph F. & M. Ins. Co.*, 39 Wis. 489.

⁶ *Columbia Ins. Co. v. Stone*, 3 Allen (Mass.), 385.

⁷ *McAllister v. N. Eng. Mut. L. Ins. Co.*, 101 Mass. 558.

⁸ *Wilkins v. Tobacco Ins. Co.*, 30 Oh. St. 317.

⁹ *Aetna Ins. Co. v. Maguire*, 51 Ill. 342.

policy the note shall be delivered up, a delivery to a stranger with notice to the company is not sufficient.¹

339. Where the insured can cancel on "surrendering the policy at any time after the premium notes have been paid, the company retaining the short rates" and all expenses incurred in taking risk, if the expenses are included in the "short rates," those included are not in addition to the "short rates" to be retained by the company.² It has been held that the "customary short rates" do not include "the expenses of writing the risk," which would comprehend the insurer's agent's commission.³ Where there is nothing to show any difference between the customary "short rate" and the rate of the premium, a difference will not be assumed to exist.⁴ When the premium note is due, but the portion paid is in excess of the "short rates and all expenses incurred," it is not material that the insured should pay the premium notes before demanding a cancellation.⁵ And the receipt of the policy by the agent authorized to cancel, without return by the insurer of the premium less the "short rate," has been held a cancellation, as no overt act of acceptance is necessary, and a separate suit would lie for the recovery back of the premium paid.⁶ Where an insurer refused to receive an over-due premium alleging a lapse, the lady insured obtained a judgment adjudging the policy to be in force on her paying the premium in forty days, or electing to take a paid-up policy. She elected to take the paid up-policy and returned the old policy cancelled. The company, without answering, retained the papers and appealed to the General Term, which modified the first judgment, by striking out the provision in reference to a paid-up policy, and the insured soon thereafter died. Then after the forty days the plaintiff demanded a return of the policy and of the deed of cancellation, but received no answer. The defendant subsequently appealed to the Court of Appeals, where the second judgment was affirmed; and in an action upon the policy it was held that the plaintiff was not bound to tender the premiums till the defendant returned or evinced a disposition to return the policy and deed of

¹ Amer. Ins. Co. v. Woodruff, 34 Mich. 6.

² Burlington Ins. Co. v. McLeod, 34 Kan. 189.

³ State Ins. Co. v. Horner, 14 Colo. 391.

⁴ Home Ins. Co. v. Burnett, 26 Mo. Ap. 175.

⁵ *Ib.*

⁶ Crown Point Iron Co. v. Aetna Ins. Co., 53 Hun (N. Y.), 220.

cancellation, or to advise her of its determination to require payment of the premiums; and, therefore, the plaintiff was entitled to recover the amount of the policy less the amount of the unpaid premiums with interest.¹ The construction of what are "short rates" is fixed by the insurer, but the determination of what are "reasonable expenses" is for the jury.² The ratable damage clause does not affect the cancellation clause. Thus a provision in a policy, "that in case there be any insurance in any other office extending to the property hereby insured, then this company in case of a loss will only be liable to pay its ratable proportion of the damage," was considered to refer to other insurance at the time of the loss, and not to prevent the insured from cancelling another policy then in existence before the loss had occurred.³

340. The insured should ask for cancellation before the contract has in any way altered the mutual liabilities of the parties. Thus, after the issue of a policy payable in four instalments, the insured cannot avoid the note by the surrender of his policy after an instalment is due, without at least paying what is due on the instalment.⁴ So a policyholder after insolvency cannot by agreement with the officers of the insurance company pay a small percentage and have his policy cancelled and escape assessment, though the company at the time had not been declared insolvent.⁵ Neither is the insured entitled to a cancellation after the policy has been avoided by reason of other insurance.⁶ Where the insured is entitled, on alienation, to surrender his policy and demand a certain return of his deposit, and it was provided that all deposit money not demanded within one year "from the expiration of the policy" shall be deemed forfeited, it was held the words meant from the expiration of the time for which the policy was effected; for the phrase was used in the Act of incorporation, where any termination except by efflux of time was not contemplated.⁷ In such a case a year after the alienation, a surrender and demand of the return deposit would not

¹ *Hayner v. Amer. Popular L. Ins. Co.*, 69 N. Y. 435.

² *Burlington Ins. Co. v. McLeod*, 34 Kan. 189.

³ *Lattan v. Royal Ins. Co.*, 45 N. J. L. 453. See *post*, § 882 *et seq.*

⁴ *Amer. Ins. Co. v. Garrett*, 71 Iowa, 243.

⁵ *Doane v. Millville Mt. M. & F. Ins. Co.*, 43 N. J. Eq. 522.

⁶ *Colby v. Cedar Rapids Ins. Co.*, 66 Iowa, 577.

⁷ *Sullivan v. Mass. Mut. F. Ins. Co.*, 2 Mass. 318.

be unreasonable, for it is not analogous to a notice of an abandonment, which by delay may injure the underwriter, but a delay to ask for the return deposit gives the company the use of the money for nothing in the meantime.¹

The insured's mailed request to cancel takes effect from the time of the arrival of the mail.² If the insurer relies on the insured's cancellation, he has the burden of showing it.³ And if the insured is allowed by statute to have the policy cancelled on request, the insurer relying on the cancellation must show that a request was made.⁴

DIVISION II.—RENEWAL.

341. Contracts of insurance made for a definite period are frequently renewed by a agreement of the parties, and often the privilege of renewal is given to the insured in the policy. Whether renewed by virtue of a proviso in the policy or a separate agreement, a renewal may be regarded as a new contract. It may be made not only between the same parties, but the insurer may renew a fire policy to the executor of the insured,⁵ and he may renew to one of several originally insured.⁶ It is not always clear for whose benefit the renewal is intended. Where a policy for a wife and children is taken, and is renewed after the death of several, it was held to be in a modified sense a new contract for those then living, so that at the last renewal the sole survivor took.⁷ Where the administrator directed his agent, who happened to be the guardian of the heirs, to pay the premium on a renewal, and the receipt stated it was received "from the estate" of the decedent, while the agent, who had funds of the administrator and heirs, paid the premium out of the latter fund and charged it against the heirs, it was held to be for the administrator.⁸ On a renewal of a policy taken by A. payable to B. as mortgagee, the insurer gave a receipt, but through an oversight made out the new policy to B. as owner, which was not

¹ *Supra*.

² *Crown Point Iron Co. v. Aetna Ins. Co.*, 127 N. Y. 608.

³ *McCartney v. State Ins. Co.* 45 Mo. App. 373; *Crown Point Iron Co. v. Aetna Ins. Co.*, 127 N. Y. 608.

⁴ *Crown Point Iron Co. v. Aetna Ins. Co.*, 127 N. Y. 608.

⁵ *Phelps v. Gebhard F. Ins. Co.*, 9 Bos. (N. Y.) 404.

⁶ *Lockwood v. Middlesex Ass'n Co.*, 47 Conn. 553. See also *Lancey v. Phoenix F. Ins. Co.*, 56 Me. 562.

⁷ *Robinson v. Duval*, 9 Ins. L. J. 897 (Ky.).

⁸ *Herkimer v. Rice*, 27 N. Y. 173.

discovered till after the loss. With A.'s consent, the insurer then paid B. up to his interest, and it was held A. was entitled to the surplus.¹ Where an agent of the insured was directed to surrender a life policy, and entrusted by the insured to carry it through, but, instead of so doing, renewed it before it was cancelled, stating he did so at the desire of the insured on behalf of himself and another, and paid the insured the surrender value, etc., it was held, as he had stated he acted for the intestate that he was bound by his statement, and having acquired advantage by departing from his instructions that he must account to the representative of the decedent.²

342. When the insurer is a corporation, the renewal must be by an authorized agent. One held out as a general agent can renew.³ And where an agent was authorized to renew, and the policy provided that the agent should endorse on an alienation his assent in writing, a verbal assent was considered to be a renewal within his power, and not a mere improper attempt to fulfil the proviso.⁴ A policy issued by an unauthorized agent, but renewed by any one authorized, has been held binding.⁵

343. The requirements, on the part of the insured, to obtain a renewal of a policy are obviously precedent. If the right to renew is provided for in the written contract of insurance, the written conditions, as in other contracts, only apply, and negotiations before the contract as to renewal was made are merged in the writing.⁶ If, on a renewal, notice of other insurance already made or that shall be made is required, notice of an existing insurance is not a compliance with the requirement.⁷ Notice of an intention to renew is not notice of a renewal.⁸ But where a guarantee policy for three years provided "every guarantee shall be made for a specified term . . . but shall be treated as a renewal contract . . . unless the member . . . shall give . . . notice of an intention not to renew," and, after payment of a year's premium, a claim due was set off against the remaining premiums, leaving a balance due from the insured, who told the agent he was dissatisfied at not receiving cash, and

¹ *Akin v. Liv. & Lond. & Globe Ins. Co.*, 6 Ins. L. J. 341 (E. D. Ark.).

⁵ *Beal v. Park F. Ins. Co.*, 16 Wis. 241.

² *Dutton v. Willner*, 52 N. Y. 312.

⁶ *Giddings v. Phoenix Ins. Co.*, 90 Mo. 272.

³ *West. Home Ins. Co. v. Hogue*, 41 Kan. 524.

⁷ *Healey v. Imperial F. Ins. Co.*, 5

⁴ *Imperial F. Ins. Co. v. Durham*, 117 Pa. St. 460.

Nev. 268.

⁸ *Ib.*

that he should withdraw from the society, and in fact made no more payments, nor were any demanded by the society, it was held to be a sufficiently clear declaration of notice to withdraw.¹ Where the policy provides that "every guarantee shall be made for a specified term, but all guarantees upon gross annual return, etc., whatever may be the original term of the same, shall, from the expiration of such original term, be treated as a renewal contract of the like nature and conditions, unless either the member interested therein or the board of directors shall give two calendar months' notice of an intention not to renew," the guaranteed was held bound where he had not given notice not to renew.² But in the event of no notice being given, the guarantee would become a renewed contract for only one period from the expiration of the original term, and was not from time to time renewable by the insured.³

344. The agreement of renewal must be mutual. Mere negotiations as to a renewal are insufficient.⁴ Merely leaving a policy at the office, saying to the officer "Bind it," and receiving no reply, is not sufficient evidence of a renewal.⁵ Where, through an error of the insured, or both of the insured and agent of the insurer, a mistake is made as to the amount of the risk, the insurer cannot be held beyond the amount he agreed to pay.⁶ The delivery of a renewal receipt forms sometimes a factor in the completion of the contract. The delivery by the agent to the insured need not be physical, but the retention of a receipt on a completed contract at the insured's request is sufficient.⁷ Where an agent empowered to countersign and give renewal receipts dies after making out a receipt, but before countersigning it, evidence of a similar receipt of a prior premium, also not countersigned, which was found among his papers, was admitted, and it was held sufficient evidence of payment of the premium.⁸ A reply by the agent, who had agreed to

¹ Hawthorne's Case, 10 W. R. 572.

⁵ Royal Ins. Co. v. Beatty, 119 Pa.

² Solvency Mut. Guarantee Co. v. York, 3 H. & N. 588.

St. 6.

³ Solvency Mut. Guarant. Co. v. Froane, 7 H. & N. 5.

⁶ Johnson v. Conn. F. Ins. Co., 84 Ky. 470.

⁷ Tennant v. Travellers' Ins. Co., 31 Fed. R. 322 (N. D. Cal.).

⁴ Taylor v. Phoenix Ins. Co., 47 Wis. 365; O'Reilly v. Corp. of Lond. Assur., 101 N. Y. 575; Idaho Forwarding Co. v. Fireman's Fund Ins. Co., 29 Pac. R. 826 (Utah).

⁸ Norton v. Phoenix Mut. L. Ins. Co., 36 Conn. 503.

renew and had got a renewal premium, on being asked for a certificate of renewal, that he had delivered it, is an admission against the insurer and part of the *res gestæ*.¹ Whether an agreement to renew docs or does not exist is for the jury.²

345. An agreement in a policy providing for an option to renew is of course part of the original contract,³ but the exercise of that option or a renewal is necessarily a new contract.⁴ It has been even said that a life policy is a contract for a year with a perpetual right of renewal by the payment of an annual premium.⁵ But, as is elsewhere stated,⁶ it is submitted that a life contract is a single contract,⁷ the consideration on both sides being based on the probable duration of the whole life, in which the risk becomes more valuable at the termination of each year; and, though the annual premium is usually uniform, this is not universally so, and, when so, the amount is arrived at by charging more than the risk is worth during the first period of the contract and less than it is worth during the last. In Maryland a sealed policy issued to a copartnership, provided for renewals on the payment of a renewal premium and issue of a renewal receipt, and had been frequently renewed; at the date of the last verbal renewal a new member had been added to the firm, though its style was not changed; in an action of *assumpsit* it was held that the policy contemplated a renewal as a specialty, not verbal renewals to be evidenced by receipts, and that *assumpsit* would not lie by the members of the new firm.⁸ But a sealed policy need not necessarily be renewed by a sealed instrument,⁹ but may be renewed by *parol*.¹⁰ In Maryland, where a sealed policy was issued to a

¹ *Scott v. Home Ins. Co.*, 53 Wis. 238.

² *Firemen's Ins. Co. v. Floss*, 67 Md.

³ *Giddings v. Phoenix Ins. Co.*, 90 Mo. 272.

⁴ *Lockwood v. Middlesex Mut. Assur.*

⁵ See *New Eng. F. & M. Ins. Co. v. Co.*, 47 Conn. 553; *Trustees First Baptist Church v. Brooklyn F. Ins. Co.*, 19 N. Y. 305; *Post v. Aetna Ins. Co.* 43 N. Y. 305; *Payette Co. Mut. F. Ins. Co. v. Neel*, 6 W. Barb. (N. Y.) 351. But see also *Roberts v. Germania F. Ins. Co.*, 71 Ga. 478;

⁶ *Hart. F. Ins. Co. v. Walsh*, 54 Ill. 164; *Ludwig v. Jersey City Ins. Co.*, 48 N. Y. 379, 383.

Firemen's Ins. Co. v. Floss, 67 Md. 403; *Emery v. Boston M. Ins. Co.*, 14 Ins. L. J. 427 (Mass.), 508; *King v. Hekla F. Ins. Co.*, 58 Wis. 508.

⁷ *Thompson v. Cundiff*, 11 Bush (Ky.), 567.

¹⁰ *King v. Hekla F. Ins. Co.*, 58 Wis. 508.

⁸ See *ante*, § 6; *post*, 895.

⁹ *Mut. Benef. L. Ins. Co. v. Robertson*, 59 Ill. 123.

firm, which did not provide for a renewal, a verbal renewal was held not to be a renewal of the sealed policy, but a new parol contract of insurance, and therefore a recovery could be had against the insurer by the firm as constituted at the date of renewal, though there had been a change in its members since the policy's original issue.¹ On an oral agreement to renew, the contract is complete when the minds of the parties meet, and nothing remains to be done except delivery of the renewal receipt.²

A parol renewal is not in New York within the Statute of Frauds.³

346. A policy renewed, unless otherwise expressed, is assumed to be on the same terms as the original contract.⁴ Thus a condition that if the premises "shall become vacant or unoccupied, and so remain," the policy should be forfeited, applies to a vacancy on a renewal as well as thereafter.⁵ And in an action by the assignee on a fire policy, which was accepted upon the faith of the representations of the insured in the application, parol evidence is admissible to show that representations were in fact made by the insured, and, if adopted by the assignees on their renewals, the evidence would be equally admissible.⁶ Where a clause permitted a renewal, "provided always the original policy is in full force," and at the issue of the policy there had been a small judgment, unknown to the defendant and unnoticed in the application, which was paid before renewal, it was held if it would have avoided the original policy as an incumbrance, it would not avoid the renewal, as the policy was then in force.⁷ In *Chapman v. Gore Dist. Mut. Ins. Co.*,⁸ at the issue of the policy an incumbrance, which would have forfeited the policy, was not stated, though it was paid off after the policy had expired. The insured, on applying for a new policy, only mentioned the one actual incumbrance, and took an assignment of the expired policy, instead of a new one; and it was held, under

¹ *Firemen's Ins. Co. v. Floss*, 67 Md. 403.

² *King v. Hekla F. Ins. Co.*, 58 Wis. 508.

³ *Trustees First Baptist Church v. Brooklyn F. Ins. Co.*, 19 N. Y. 305.

⁴ *New Eng. F. & M. Ins. Co. v. Wetmore*, 32 Ill. 221; *Hart. F. Ins. Co. v. Walsh*, 54 Ib. 164; *Burson v. F. Ass'n*, 136 Pa. 267; *Sheppard v. Peabody Ins.*

Co., 21 W. Va. 368. See *England v. Westchester F. Ins. Co.*, 81 Wis. 583.

⁵ *Hotchkiss v. Home Ins. Co.*, 58 Wis. 297.

⁶ *Clark v. Mfrs. Ins. Co.*, 8 How. 235.

⁷ *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410.

⁸ 26 U. C. C. P. 89.

these circumstances, that the original misrepresentation could not be set up. Where a policy, which was issued in consequence of the misrepresentations of the insured, which did not, however, avoid unless intentional, was exchanged for another which provided that any misrepresentation should work a forfeiture, it was held the original condition could not be incorporated in the second policy.¹ An incumbrance created after the date of the original policy, which required a disclosure of any incumbrances then existing, was held not required to be disclosed at the time of the renewal.² And a mortgage, executed within the original term before the renewal, is not a breach of a condition in the renewed policy to the effect that if a mortgage be executed subsequently to the delivery of the policy it shall be forfeited.³ In Canada, the condition, "Assurances once made may be continued . . . and all assurances, original or renewed, shall be considered as made under the original representations, in so far as they may not be varied by any new representation in writing, which, in all cases, it should be incumbent on the assured to make when the risk has been changed," was held by McLean, C. J., to apply to an unnotified change during the original term; but by Hagarty, J., that the condition did not require a new representation till a renewal.⁴ A renewal is assumed to be made in reference to a city ordinance passed between the date of the policy and the renewal, which forbids the erection of wooden buildings in a town; and, therefore, the insured can recover, though the price of the reinstating in wood would be much cheaper than in stone, or than to pay the value of the policy.⁵ Where a policy was renewable on the original representations, unless varied in writing, and the insured was required to make a written application on a renewal if the risk had been changed, and it was provided that if there should be no information of an increase in risk the policy should be forfeited, an oral statement of the change in risk was held sufficient.⁶

347. A renewed policy, *primâ facie*, protects the same risk.⁷ But

¹ *Klaiber v. Ill. Benev. Masonic Soc.*, 12 Ins. L. J. 125 (N. D. Ill.).

² *Fayette Co. Mut. F. Ins. Co. v. Neel*, 6 W. N. C. (Pa.) 233.

³ *Lebanon Mut. Ins. Co. v. Leathers*, 6 Cent. R. 901 (Pa.).

⁴ *Lomas v. Brit. America Assur. Co.*, 22 U. C. Q. B. 310.

⁵ *Brady v. Northw. Ins. Co.*, 11 Mich. 425.

⁶ *Liddle v. Market F. Ins. Co.*, 29 N. Y. 184.

⁷ *Hart. F. Ins. Co. v. Walsh*, 54 Ill. 164; *Aurora F. & M. Ins. Co. v. Kranch*, 36 Mich. 289; *Hay v. Star F. Ins. Co.*, 77 N. Y. 235.

by agreement the renewal may embrace changed interests. For instance, where the amount of the risk is distributed among different subjects covered, but is renewed in a lump sum without such distribution, the risk was held general.¹ And where after the expiration of the old insurance the goods had been removed from the locality described as "first floor" to different floors in the same building, of which the insurer had notice, and the renewal paper referred to the old policy and the building, but omitted the words "first floor," the policy was held to modify the old contract and include the goods on all the floors.² And where the renewal was clearly on a more extensive interest in property, a representation of the insured that there "had been no alteration in or about the property to be insured material to the risk since the application," was considered not false, as the change had been in the scope of the policy, not in or about the property insured.³ Where a new policy with notice of an increased risk is substituted for a renewed policy, notice of which had been given before the original renewal, the notice runs through subsequent renewals.⁴ Where fire and ice are excepted perils, but the renewal provided "it is understood that assured is not entitled to claim for any loss or damage arising from ice," and a second renewal stated "the within policy is renewed" by endorsement, it was held that this applied to the original policy, and not to the first renewed policy, and, therefore, fire was not covered after the first renewal.⁵ If the new term is not stated, the original term of the policy will be understood.⁶ In Kentucky, a renewed policy, in the absence of a contrary intention, runs as if underwritten on the day of its renewal.⁷

348. The payment of the premium on a renewal, unless stipulated for, is not precedent to the formation of the contract;⁸ and where no rate is named the old rate will be presumed to have been intended.⁹

¹ *Driggs v. Albany Ins. Co.*, 10 Barb. (N. Y.) 440.

⁶ *Honnick v. Phoenix Ins. Co.*, 22 Mo. 82.

² *Ludwig v. Jersey City Ins. Co.*, 48 N. Y. 379. See also *Eddy St. Iron Foundry v. Farmers' Mut. F. Ins. Co.*, 5 R. I. 426.

⁶ *Scott v. Home Ins. Co.* 53 Wis. 238.

⁷ *Noyes v. Hart. F. Ins. Co.*, 54 N. Y. 668.

³ *Eddy St. Iron Foundry v. Farmers' Mut. F. Ins. Co.*, *supra*.

⁸ *Queen Ins. Co. v. Baldwin*, 71 L. T. 417.

⁹ *Post v. Ætna Ins. Co.*, 43 Barb. (N. Y.) 351.

⁴ *People's Ins. Co. v. Spencer*, 53 Pa. St. 353.

In *Salvin v. James*,¹ a policy was to continue "so long as the insured should pay the said premium at the said times," and "the office should agree to accept," and it was further stipulated that future payments should be made annually at the office "within 15 days after the day limited by the policy, upon forfeiture of the benefit thereof;" that "no insurance was to take effect till the premium was paid," and that all persons insured "by policies for a year or more had been and should be considered as insured for 15 days beyond the time of the expiration of their policies." Before the expiration of the year the insured was notified to pay an increased premium for the ensuing year, otherwise the insurance would not be continued, which he refused to do, and it was held, on a loss within the fifteen days from the expiration of the year, that the insurer was not liable, though the insured, after the loss and within the 15 days, tendered the premium demanded; as the effect of the contract was to give an option to renew within the 15 days on payment of the premium, notwithstanding an intervening loss, provided the office had not, before the expiration of the year, determined the option by notifying the insured of its refusal to renew. In *Tarleton v. Staniforth*,² where the insured in a policy for a half year agreed to pay premiums as long as the insurer should accept them in advance within 15 days from termination of the six months, and a loss occurred within the fifteen days from the end of the six months, but before the premium was paid for the next, the insurers were held not liable, though the insured made a tender before the end of the fifteen days, but after the loss. But where the policy provided it should not be valid for more than 15 days after the time limited, unless the premiums and stamp duty for the renewal should be paid within that time, and a loss occurred after the expiration of the year, but within the fifteen days, the insurers were held liable.³ Where the insurer renews the policy and holds his agent for the premium, this is a valid contract in favor of the insured.⁴ Where the term on which certain lapsed policies should be renewed had been ascertained by consent, and the plaintiffs, agents of the insurance office, remitted £100, which was in excess of what they owed the office as agents for premium, it was held, though the officers had not appropriated any part of the £100 to payment of

¹ 6 East, 571.

³ *McDonell v. Carr*, H. & J. (Ir.) 256.

² 1 B. & P. 471.

⁴ *Planters' Ins. Co. v. Ray*, 52 Miss. 238.

the premiums on the lapsed policies, yet it must be taken to have received the money on account thereof, and therefore that there was a good contract for renewal from the date of receipt.¹

A provision in a policy already executed, that no insurance whether original or continued should be binding until the actual payment of the premium and the written acknowledgment thereof, was held not to invalidate a subsequent parol contract to renew such insurance, in consideration of a premium not paid at the time the risk attached, but postponed to a future day.²

¹ Kirkpatrick v. S. Australian Ins. Co., 11 Ap. Cas. 177.

² Trustees First Baptist Church v. Brooklyn F. Ins. Co., 19 N. Y. 305.

CHAPTER V.

RIGHT TO RECEIVE A PAID-UP POLICY AND DIVIDENDS.

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DIVISION I.—RIGHT TO RECEIVE A PAID-UP POLICY.

349. Not unusually a policy of life insurance gives the insured an option, after the payment of a certain number of premiums, to exchange upon certain conditions the insurer's agreement to pay the amount of the insurance stipulated for, which was based on the

payment of annual premiums, for a paid-up policy in a lesser amount, proportionate to the amount of premiums actually paid. In certain States statutes exist compelling the insurer to issue under certain conditions a paid-up policy to the insured based on the value of the premiums already paid. The Massachusetts Act of 1861, c. 186, is an example of this species of legislation. A policy made before the passage of this Act, however, does not come within it, though a certificate acknowledging the receipt of an annual premium was had after the Act, as this does not constitute a new contract but merely renews the old one.¹ The question whether this Act applies to contracts by a foreign insurer would depend upon where the contract was made, and it was held that the test of the locus of the contract was the place where the minds met, that is, where the proposal was accepted; the circumstance of where the agent actually delivered the policy and accepted the premiums or application being immaterial.² This Act was held by force of the Statute of 1872, c. 325, sec. 7, to apply to foreign as well as to domestic companies.³ But by the Act of 1880, c. 232, such law is not to apply to policies issued after December 31, 1880.⁴ The option to exchange a policy for a paid-up policy, however, unless created by statute, is not a right that every person insured has; and unless such a right is given in the policy or by statute, the insurer is under no obligation to convert a policy into one paid up.⁵ But there is no reason to prevent the company from verbally agreeing, even subsequently to the issue of a sealed policy, that it may be changed on a failure to pay after a certain number of payments to a paid-up policy.⁶ And obviously the conditions imposed by the insurer in an outside agreement must be fulfilled by the insured as in any other contract.⁷

350. When this option is exercised by the insured, the conditions of the policy for original insurance in the larger amount apply equally to the commuted policy for the fractional sum.⁸ When the

¹ *Shaw v. Berkshire L. Ins. Co.*, 103 Mass. 254.

⁵ *Packard v. Conn. Mut. L. Ins. Co.*, 9 Mo. Ap. 469.

² *Shattuck v. Mut. L. Ins. Co.*, 4 Cliff. 598 (D. Mass.).

⁶ *Gates v. Home Mut. L. Ins. Co.*, 4 Amer. L. Rec. 395 (Oh.).

³ *Holmes v. Charter Oak L. Ins. Co.*, 10 Ins. L. J. 348 (Mass.); *Morris v. Penn Mut. L. Ins. Co.*, 120 Mass. 503.

⁷ *Packard v. Conn. Mut. L. Ins. Co.*, 9 Mo. Ap. 469.

⁴ See *Smith v. Mut. L. Ins. Co.* (D. Mass.); Jan. 1881.

⁸ *Merritt v. Cotton States L. Ins. Co.*, 55 Ga. 103.

policy provides for this option, certain obligations are imposed upon the insured which are precedent to the grant of the paid-up policy. Thus, the conditions stipulating for a demand for the new insurance and surrender of the old policy are precedent.¹ A demand for a paid-up policy may be made by the insured upon a previously accredited agent,² or upon an agent whose authority is created by ratification,³ unless the policy provided for a demand upon a particular individual. The insurer must either supply a proper form of contract for paid-up insurance, or sign the written one which the insured offers if it has the same legal effect, for it cannot arbitrarily decline.⁴

351. The time within which the demand for a paid-up policy may be made, or the old policy surrendered, is usually vital. When the policy provides that a demand and surrender of the old policy shall be made within a specified time, this is precedent to the right to obtain a paid-up policy.⁵ And it has been held that restraining the insurer from issuing policies during the period within which the demand should have been made will not excuse a tender by the insured of the original policy.⁶ But if the company refuses because of an impending dissolution to accept premiums on a policy, it is estopped from setting up a sixty-day limit within which to transmit a policy to be exchanged for one paid-up after default in payment.⁷ Where the policy provided that a surrender-value policy must be demanded within one year from the time an accrued premium fell due, it was held to mean an accrued premium for the non-payment of which the company can determine the policy; and where notes were taken when the premium fell due and renewal receipts given therefor, it was considered as preventing the company from insisting on forfeiture for non-payment with respect to the contract.⁸ Where the insured, having thirty days, sent the old policy to a

¹ *Schumacher v. Manhattan Ins. Co.*, 3 Ins. L. J. 455 (Mo.).

² *Belt v. Brooklyn Life Ins. Co.*, 12 Mo. Ap. 100.

³ *Andrews v. Ætna L. Ins. Co.*, 92 N. Y. 596.

⁴ *Watts v. Phoenix Mut. L. Ins. Co.*, 16 Blatch. 228 (E. D. N. Y.).

⁵ *Universal L. Ins. Co. v. Whitehead*, 56 Miss. 226; *Universal L. Ins. Co. v. DeVore*, 88 Va. 778; *Knapp v. Homæo-*

pathic L. Ins. Co., 117 U. S. 411; *Coffey v. Universal L. Ins. Co.*, 10 Biss. 354 (E. D. Wis.); *North v. N. Amer. Mut. L. Ins. Co.*, 5 Coast Rev. 93.

⁶ *Universal L. Ins. Co. v. Whitehead*, *supra*.

⁷ *Coffey v. Universal L. Ins. Co.*, 10 Biss. 354 (E. D. Wis.).

⁸ *Mich. Mut. L. Ins. Co. v. Bowes*, 42 Mich. 19.

sub-agent who was not employed by the company, from whom the policy was received and to whom the premiums were paid, with a request to forward it and get a paid-up policy within twenty days after the non-payment of the last premium, the request was answered by the company at the expiration of thirty days, stating the policy would show what was to be done; thereupon proper papers were delivered to the general agent, and it was held this was in equity a surrender within a sufficient time.¹ Under the Massachusetts Act of April 10, 1861, which provided that no life policy should be forfeited for the non-payment of a premium until the expiration of a term of temporary insurance provided for according to an actuarial scheme, the evidence of an actuary as to the computation in accordance with the Statute is admissible to show that the temporary insurance created thereby had expired prior to the death of the insured.² Where the policy provides for a surrender of the old policy "while in force," a surrender after it had been avoided or lapsed is too late.³ And where the proviso was simply to issue a paid-up policy on demand after a certain number of payments, it was thought the new policy could only be demanded during the life of the old one.⁴ In the Pennsylvania case, in any event, it was too late, as seven years had elapsed, the company was dissolved, and a receiver appointed before the surrender.⁵

352. In a number of cases, however, it has been held that the right of the insured under the clauses to recover a commuted sum did not depend upon the surrender and demand for a new policy within the time stipulated; but these decisions were based upon the existence of special words in the policy which the Courts construed as agreements by the insurer, on the insured's failure to pay, to be liable for a proportionate amount of insurance.⁶ In *Winchell v. John Hancock Mut. L. Ins. Co.*,⁷ it was provided that "at any time after

¹ *Morrison v. Amer. Popular L. Ins. Co.*, 5 Ins. L. J. 752 (D. N. H.). 34 Oh. St. 222; *Smith v. Nat. L. Ins. Co.*, 103 Pa. St. 177.

² *Greenfield v. Mass. Mut. L. Ins. Co.*, 47 N. Y. 430.

³ *Smith v. Nat. L. Ins. Co.*, *supra*.

⁴ *Phoenix Mut. L. Ins. Co. v. Baker*, 85 Ill. 410; *Koehler v. Phoenix Mut. L. Ins. Co.*, 12 Ins. L. J. 470 (Ky.).

⁶ *Montgomery v. Phoenix Mut. L. Ins. Co.*, 14 Bush (Ky.), 51; *Chase v. Phoenix Mut. L. Ins. Co.*, 67 Me. 35;

Doer v. Phoenix Mut. L. Ins. Co., 1b. 438.

⁷ *People v. Widows' & Orphans' Benef. L. Ins. Co.*, 15 Hun (N. Y.), 8; *Bussing v. Un. Mut. L. Ins. Co.*,

⁸ 8 Ins. L. J. 651 (D. Mass.).

one annual premium has been paid . . . the policy may be surrendered at the option of the insured for a paid-up policy. The policy provided for a forfeiture for the failure to pay a premium, subject, however, to the 186th chapter of the Act of 1861 of Massachusetts, which continues temporarily all policies, forfeited for failure to pay premiums, in force according to their net value, provided notice and proof of death should be submitted to the insurer within ninety days after the death of the insured. The premiums on the policy had not been paid for four years, and through ignorance of the policy's existence notice was not given, as required, within the ninety days. It was held that equity would not relieve against the forfeiture for neglect to give the notice, but that the insured had a choice between a paid-up policy and the temporary extension under the Massachusetts Act; and that the policy need not be in force at the time of the insurer's demand for a paid-up policy; but the Court added, in any event, the policy was in force, in fact under the Act when the insured died, and was only forfeited as to the right of extension, beyond the time the Act extended it; and, therefore, being kept in force by the Act, the insured could still exercise the option. It was held in New York,¹ on a policy which was made stipulated to be non-forfeitable after two payments, and that after a subsequent failure to pay the insurer would issue a paid-up policy for its then value, and in Massachusetts,² under the Act, that the right to a paid-up policy was not a personal contract, but that the insured's representative could demand it within the time allowed. In a proviso, that this policy of insurance after two annual premiums shall have been paid thereon, shall not be forfeited or become void by reason of the non-payment of premiums, but the party insured shall be entitled to have it continued in force for a period to be determined as follows, to wit: "The net value when the premium becomes due shall be computed by actuaries' rates, etc., with interest, at four per cent.; four-fifths of such net value shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be computed according to the age, etc., of the party, or at his option he may receive a full paid-up policy for the amount of the premium paid;

¹ *Wheeler v. Conn. Mut. L. Ins. Co.*,
82 N. Y. 543.

² *Winchell v. John Hancock L. Ins. Co.*, 8 Ins. L. J. 651 (D. Mass.).

provided that unless this policy shall be surrendered and such paid-up policy shall be applied for within ninety days after such non-payment of premium as aforesaid, then this policy shall be void," the words "paid-up policy" in the proviso were held to apply to both alternatives, and therefore the benefit of the paid-up policy could not be had in either form unless the surrender and application were made within the term prescribed in the proviso.¹ The words in a clause "at any time," after a blank number of annual premiums, do not mean only after the blank number, but may mean after that and more; it is a *terminus a quo*.² In *Sheerer v. Manhattan L. Ins. Co.*,³ the policy contained the usual clause of forfeiture for failure to pay premiums, and subsequently the company delivered to the insured a paper agreeing, after the receipt of three annual premiums, upon a surrender of the policy on or before it should expire by the non-payment of the fourth or subsequent premium, to deliver to a paid-up policy, etc. It was held the surrender might be within a reasonable time, as there was no clause of forfeiture in the separate agreement, and the two instruments should be construed together.

353. The amount of insurance the insured is entitled to in the paid-up policy depends on the terms of the contract, which are variously expressed. The stipulation that if after the first annual premium is paid a subsequent default shall not forfeit, but the holder may surrender the policy and get a paid-up policy for the amount which the value of the surrendered policy would buy, ascertained in a specific way, and considered as a gross premium according to the single premium rates, does not mean that the full amount of the policy is assured by the payment of one premium but that the policy is only to be kept for the value which the clauses, after the non-forfeiture paragraph, indicate.⁴ A clause provided that after the payment of two annual premiums it should not be forfeited by reason of non-payment thereafter, and gave the assured the option to "receive a paid-up policy for the full amount of premium paid." The insured had taken a policy for \$3000, upon which he had paid ten annual premiums of \$389.16, and it was held,

¹ *Knapp v. Homœopathic Mut. L. Ins. Co.*, 117 U. S. 411.

² 16 Fed. R. 720 (D. Ky.).

³ *Winchell v. John Hancock L. Ins. Co.*, 8 Ins. L. J. 651 (D. Mass.).

⁴ *Mound City Mut. L. Ins. Co. v.*

Huth, 49 Ala. 529.

as the policy contained no words of restriction, the insured was not limited to the amount of the original insurance, but was entitled to a paid-up policy to be computed as covenanted.¹ The clause that after "payment of two annual premiums" "a new policy will be issued for the amount of cash premiums, in even hundreds of dollars received by the company," implies, where the premium is composed of cash and notes, that the cash portion, or at least the paid portion only, is taken into consideration, and where \$706.50 had been paid as the cash portion of the premium and notes given for the remainder which were unpaid, the new policy would be \$700.² Where the policy has been forfeited by failure to pay a note, the amount of the note must be deducted from the net value of the policy, in determining the premium of temporary insurance under the Massachusetts statute, which, after certain number of premiums paid, gives a paid-up policy to the insured.³ But in *Goodwin v. Mass. Mut. Life Ins. Co.*,⁴ it was held that an unpaid premium upon a policy of life insurance is not an "indebtedness" within the meaning of the statute of Massachusetts providing for the continuance and validity of such a policy for a limited period after failure to pay the premium; therefore it cannot be deducted from the net value of the policy in determining the amount of premium for temporary insurance. In *Van Creelen v. Mass. Mut. L. Ins. Co.*,⁵ there was a stipulation in a Massachusetts company, that the unpaid portion of the year's premium should be a debt, and that a failure to pay any instalments should forfeit, except as by c. 186, Laws of Massachusetts, 1861. Held, this did not violate the statute, as the amount of the unpaid premium should be deducted from the net value at the date it became due, in ascertaining the net single premium to the credit of the insured, and intended by the statute to carry a temporary insurance, notwithstanding the failure to pay the stipulated instalment of the premium when due. In *Marston v. Mass. Mut. L. Ins. Co.*,⁶ it was decided under the non-forfeiture Act of Massachusetts, that all unpaid notes given for annual premiums, including those for the

¹ *Christy v. Homœopathic Mut. L. Ins. Co.*, 93 N. Y. 345. *Mass. 500; Bigelow v. State Mut. L. Assur. Ass'n*, 123 Ib. 113.

² *Hughes v. Piedmont & Arlington L. Ins. Co.*, 55 Ga. 111. ⁴ 73 N. Y. 480.

⁵ 35 La. An. 226.

⁶ *Pitt v. Berkshire, L. Ins. Co.*, 100 59 N. H. 92.

part of the year subsequent to the forfeiture, are to be deducted in determining the net value.

The clause that on a default the insurer should not be liable for the whole sum, "but only for an amount proportionate to the number of premiums paid," where a death occurs after twenty-seven payments, and four defaults the paid-up policy would be for 27.31 of the original amount of insurance; there is no reason for asserting that the equitable value at the date of the last payment was intended.¹ But the provision in the policy that it shall be non-forfeiting "if application is made for settlement while it is in force," does not indicate in a mutual company that the insured should be treated as standing alone, but he must be considered as a partner in a common venture, bearing his share of the burdened risk, and therefore his recovery should be limited to his proportion of the reserve, or to such a paid-up policy as such proportion would purchase.² In *Timayenis v. Un. Mut. Ins. Co.*³ A. took out a policy for the wife of a third party on the latter's life, which he illegally surrendered; and later took out a new one for himself on the same life. He had paid for the premium cash and given a note which was outstanding at the surrender. When the money under the second policy was paid to A. the insurer by an arrangement deducted the amount of the outstanding notes for premiums due on the first policy. And it was held, as the insurer was not compelled to take notes instead of cash for the premiums, nor to enforce them, and as they were not paid in respect of premiums on the surrendered policy, but as a settlement under a new policy, that the amount of deduction from the payment under the second policy, being the value of the note, could not be considered as a premium paid on the first policy; and therefore could not be counted in estimating the number of premiums paid, in order to find out value of a paid-up policy for the widow. A provision that in case of forfeiture the insured shall have the benefit of such equitable adjustment as may, from time to time, be provided by the board of directors, has been construed to mean that, though the representatives of the insured would be entitled to pay any equitable adjustment provided for by the established rules of the directors, existing at the time of the forfeiture, as well as to any

¹ *Mut. L. Ins. Co. v. Bratt*, 55 Md. 200.

² *Nashville L. Ins. Co. v. Mathews*, 11 Ins. L. J. 219 (Tenn.).

³ 21 Fed. R. 223 (S. D. N. Y.).

that might be accorded by their special act, yet the establishment of such rules was left by the policy within the discretion of the directors, and the Court could not interfere.¹

354. If the insurer agrees on certain terms, which are complied with, to commute an ordinary policy to a paid-up policy in a smaller amount, this does not impliedly authorize him to alter the term the policy had to run.² Where the agreement as to a paid-up policy is embraced in the policy, proof of verbal promises or representations by an agent at the time of the contracting regarding a surrender value, were held inadmissible to alter the terms of the policy, as a written contract cannot be changed by parol evidence except in a suit to reform.³ And statements as to the effect of such forms of policies made by agents of the insurer on other occasions, and the opinion of the actuary as to the meaning usually put by companies upon a certain clause, are also inadmissible.⁴

DIVISION II.—RIGHT TO RECEIVE DIVIDENDS.

355. Dividends by an insurance company can only be legally declared out of the profits earned, or out of a surplus accumulated over expenses.⁵ Profits may perhaps be defined as the surplus of income after defraying the expenses attendant on making it, while an accumulated surplus is the residue of profits accumulated after paying dividends, or accumulated without paying any dividends at all. Sometimes, in addition to the shareholders of stock companies, the policyholders are entitled to a bonus or dividend from money earned in the concern. In New York, in *People v. Security L. Ins. Co.*,⁶ there was a provision in the charter of the company that, after paying the shareholders certain specified semi-annual dividends, at intervals of three years, the net profits should be divided twenty per cent. to the shareholders, and eighty per cent. to the policyholders. It was held that this bonus came from the business of the company, in which the policyholders were not members. It was therefore not

¹ *Nightingale v. State Mut. L. Ins. Co.*, 5 R. I. 38.

² *St. Louis Mut. L. Ins. Co. v. Grigsby*, 10 Bush (Ky.), 310.

³ *Nashville L. Ins. Co. v. Mathews*, 11 Ins. L. J. 219 (Tenn.).

⁴ *Smith v. Nat. L. Ins. Co.*, 103 Pa. St. 177.

⁵ *Russell v. Bristol*, 49 Conn. 251; *De Peyster v. Amer. F. Ins. Co.*, 6 Paige (N. Y.), 486.

⁶ *People v. Security L., Etc., Co.*, 78 N. Y. 114. See *ante*, § 74.

made in any way by them, and as to the policyholders it could not be called a profit, as in no event could they ever get a larger sum than they had paid in, though as to the company it might be so. The so-called profit was really an equitable adjustment of the premiums paid and which had been rated too high; and therefore the policyholders were not to be reckoned as sharers in the profits as to be partners in the concern in insolvency proceedings. But in *Last v. Lond. Assur. Corp.*,¹ where a life company issued "participating policies" at an increased premium, according to the terms of which at the end of each quinquennial period two-thirds of the "gross profits" of such policies were returned by way of bonus or abatement of premiums to the holders of policies then in force; and the remaining one-third went to the company, who bore all the expenses of the business, of which, the portion remaining after payment of expenses constituted the only profit available for division among shareholders, it was held by the House of Lords, Lord Bramwell dissenting, and reversing the Court of Appeals, which with a large dissent had affirmed the Queen's Bench, which was also divided in opinion, that the two-thirds returned to the policyholders were really "annual profits or gains" within the Income Tax Act and assessable as such.

356. Frequently members of mutual companies are entitled, by contract, not only to payment of a fixed sum on the arrival of a contingency agreed upon, but also to bonuses or rebates during the continuance of the contract, which is, mainly if not entirely, the result of a surplus of income arising from the premiums being fixed at a rate that is more than sufficient for expenses and the payment of losses. This is often looked upon as profit, but is rather a return, with or without interest, of what is paid in excess of what is needed for the wants of the company; for no profit in the correct sense of that word would seem to be obtainable from the people who are partners, and who only deal with each other as partners; and though popularly it may be of great profit to insure, as the money invested therein might otherwise be wasted, and the advantage of providing for one's family on the event of death is enormous, yet the profit, if any, is derived from the payment on the event insured against taking place; while the gain derived by the bonus or rebate is not

¹ 10 Ap. Cas. 438; 12 Q. B. D. 389.

technically profit, from an adventure, but rather a lessening of the price to be paid for the insurance. If this view be correct, it would seem that the bonus is in reality not a technical dividend, not being derived from profit, but in reality merely the repayment of a loan enforced by the contract, or of surplus capital.

357. Unearned premiums received in advance, on which the risks are still running, have been held not to be surplus profits out of which dividends can be legally made among the shareholders without leaving a sufficient surplus on hand to meet the probable losses upon risks then assumed and not yet terminated, independently of the capital stock of the corporation.¹ Where a reserve fund is required for the payment of losses and expenses, and the unearned premiums constitute the primary fund for that, the directors are only justified in dividing the actual profits, after deducting the above. And *semble*, if they recklessly divide the money arising from the unearned premiums without leaving any reserve fund to meet losses, the directors would be personally liable to creditors where the company, by reason of extraordinary losses, became insolvent.² Where a guarantee fund had been raised by individual subscription, which was not to be used for paying claims till all the resources of the company were exhausted, and any part used was to be returned to the subscribers out of the first surplus receipts, it was held illegal to declare a dividend founded on a surplus created by treating the fund as an asset, when otherwise the company was insolvent.³

358. A dividend as such does not vest in the individual till apportioned. Therefore, though it has been stated that directors can be compelled to divide surplus profits after proper deductions,⁴ where a company becomes insolvent before its surplus funds have been apportioned as dividends, such surplus, as well as the capital stock, must, if necessary, be applied to satisfy its debts, to the exclusion of prior claims of shareholders on such surplus.⁵ In *Le Roy v. Globe Ins. Co.*,⁶ a dividend was declared on the 10th of November, and on the 30th was carried on the books of the company to profit and loss, leaving the capital entire and a further surplus to the credit of the company for profits then earned and not divided. Public

¹ *De Peyster v. Amer. F. Ins. Co.*, 6 Paige (N. Y.), 486; *Scott v. Eagle F. Ins. Co.*, 7 Ib. 198.

² *Scott v. Eagle F. Ins. Co.*, *supra*.

³ *Russell v. Bristol*, 50 Conn. 251.

⁴ *Scott v. Eagle F. Ins. Co.*, *supra*.

⁵ *Ib.*

⁶ 2 Ed. Ch. (N. Y.) 657.

notice had been given on the 11th that this dividend was to be paid on the 1st of December, and bank checks, prepared and filled up with each party's dividend, dated 1st December and signed by the president, payable to the order of secretary, were placed in the hands of the latter to be delivered as each shareholder should call. About four-fifths of the checks had been called for when a great fire caused the insolvency of the company, but it was held that a shareholder who came after the fire was entitled to his dividend, as it had been severed.

359. The right of a policyholder to a dividend or bonus rests either on a statute, or on an express or implied contract, and he must establish his right to it before he can successfully claim it.¹ A policy indorsed "with profits" is sufficient proof that the insured is entitled in some way to profits.² When the face of a policy shows it to be "participating," a table of rates of other kinds of policies is not admissible to show that the rate paid was that fixed for a different kind of policy, it not appearing the insured knew of such table at the issue of the policy, or that he believed it was not "participating."³ A prospectus to the effect that interest was required to be paid annually in advance on one loan, and that all other interest should be paid by dividends, does not import a guarantee that the dividends would be sufficient to pay all the other interest, but merely that so far as possible they would be so applied.⁴ Most of the contracts made between the company and the policyholder as to profits or bonuses do not contemplate that the policyholder shall be permitted to participate actively in the management of the concern, or dictate the amount of bonus or dividend he may think should be declared; but the meaning of such contracts usually is that the holder shall have the benefit of such dividends as may be appropriated in the discretion of the managers acting *bona fide*.⁵ Where a policy was described as a "non-forfeitable endowment policy with profits," but was silent as to the meaning of the word "profits," it was held that the question was not what the company should earn,

¹ See *Isherwood v. N. Y. L. Ins. Co.*, 11 Ins. L. J. 927 (Oh.).

² *Currier v. Continen. L. Ins. Co.*, 57 Vt. 496.

³ *Piedmont & Arlington L. Ins. Co. v. Young*, 58 Ala. 476.

⁴ *McIntyre v. Cotton States L. Ins. Co.*, 82 Ga. 478.

⁵ See *Isherwood v. N. Y. L. Ins. Co.*, 11 Ins. L. J. 927 (Oh.); *Fuller v.*

Knapp, 14 Ins. L. J. 677 (S. D. N. Y.).

but what it did earn ; and as the insurer was bound to carry on its business in a reasonably prudent manner, it was authorized to change from the percentage to the contributive plan if that was more desirable to the interest of all classes, and that the insured was entitled to dividends under that plan and not on the basis of the other plan being continued.¹ Where a technical word like "reserve dividend plan" is employed, parol evidence would no doubt be admissible to explain its meaning.²

360. The East India Company established a fund to create pensions for members of their Bengal department, and the company agreed in each year to pay a sum equal to that subscribed by the subscribing members. The subscription of each member was based on a certain percentage during the whole period of his service, and if he desired to retire, and had not paid the half of the amount of the retiring principal which had been fixed, he must make it up, but nothing was said as to what should be done with the excess if his payments should have exceeded the requisite amount. It was held the excess need not necessarily be returned to the member, as there was no implied obligation to repay it.³ The New York Statute of 1872, c. 110, s. 1, authorizing a life company to distribute its surplus "either in cash or in reduction of premium, or reversionary insurance," was held to give to the company, not the insured, the option.⁴

361. Where a guarantee capital is authorized by statute to be subscribed to create a stock department in a mutual company, which the statute provided should be kept separate, it was held, in the absence of statutory authority, that the directors could not treat the subscribers as mere lenders of money ; so that they should have no liability for losses, but that the other department should repair the capital subscribed if it should become reduced, and guarantee dividends on the stock ; consequently the surplus made by means of the guaranteed capital should go to the subscribers, and not to the original company.⁵ The Massachusetts Statute of 1874, c. 220,

¹ *Bruce v. Continen. L. Ins. Co.*, 2 Atlan. R. 710 (Vt.).

² *Fuller v. Knapp*, 14 Ins. L. J. 677 (S. D. N. Y.) ; *post*, § 516.

³ *Boldero v. East India Co.*, 11 H. L. C. 405.

⁴ *Eastman v. N. Y. L. Ins. Co.*, 62 N. H. 1.

⁵ *Traders' & Mechan. Ins. Co. v. Brown*, 142 Mass. 403.

to the effect that "joint-stock fire and marine insurance companies organized under the laws of this Commonwealth are hereby authorized to declare and pay to the stockholders of their respective companies cash dividends not exceeding ten per centum in any one year on their capital stock," was held not to apply to companies organized under a special charter.¹ If the policyholder in a mutual company chooses to change his original contract with the company by accepting a scrip dividend of the accumulated fund of the company, which, in point of fact, did not pretend to be on account of profits, and was merely nominal and worthless, it was held he was bound by his acceptance as creating new relations.²

362. In order to share in dividends the insured must perform his part of the contract as to payment of notes and premiums, etc.³ Thus where the premium is composed of cash and a note, which is, in effect, a loan to the policyholder of the premium, and the privilege is given, on a default in the premium, after the payment of a certain number of complete annual premiums, to procure a paid-up policy, it was held, while the payment of interest on prior notes is not necessary to constitute payment of "complete annual premiums," yet the insurer was not liable for any bonus or dividend after the failure to pay such interest; for, were it not for the privilege of the paid-up policy, the whole contract would be forfeited, and the insured must perform his part if he requires the insurer to pay a dividend, which would naturally be based on the insured making all the payments required.⁴ After the forfeiture of a policy which provided for a reinstatement within a certain period, on the performance of certain conditions, where a new policy is issued at the old rate, there must be evidence of a performance of the prescribed conditions to entitle the holder to the bonuses due on the old policy, for the mere issue of the new policy at the old rate is not sufficient presumption of a performance.⁵ In *Virginia, in N. Y. L. Ins. Co. v. Clemmitt*,⁶ where a life policy was repudiated as abrogated *flagrante bello*, in a suit instituted for its adjustment, the adjustment went on the basis of the payment of all payments with interest, for

¹ *Atty.-Gen'l v. Mercant. M. Ins. Co.*,
121 Mass. 524.

⁴ *Ib.*

² *Laing v. Penn Mut. L. Ins. Co.*, 1
Phila. 249.

⁵ *Windus v. Lord Tredegar*, 15 L. T.
N. S. 108.

³ *Northw. Mut. L. Ins. Co. v.*
Bonner, 36 Oh. St. 51.

⁶ 77 Va. 366.

the insurer's act in repudiating the policy had caused the delay, therefore the insured should be entitled to all dividends just as if he had, in fact, paid annually.

363. Where a mutual life company has in its possession dividends belonging to a policy-holder, it has been held that the company should appropriate them to the premium to prevent a forfeiture.¹ And the same principle has been applied to the case of a loan secured by a policy.² And especially would this rule be appropriate when the company had been in the habit of previously applying them.³ In *Phoenix Ins. Co. v. Doster*,⁴ it was held that the company should notify the insured as to dividends, so that he may in due time tender or pay the balance, and a circular explaining the method of paying and accrediting dividends might be relied on. And the insured can rely on a representation that the appropriate dividend will be set off against the money due the insurer.⁵ But profits earned and not declared as dividends, cannot be treated as funds applicable to the payment of premiums.⁶ It must appear that a dividend, if applied, would be sufficient to meet the amount of the unpaid premiums.⁷ Thus, where a dividend was declared, as of a prior date, out of profits earned prior to such date, and during the interval between the date as of which the dividend was declared, and the time when it was actually declared, a premium due on a policy less in amount than the dividend subsequently awarded to it, was not paid; a death occurred upon which suit was brought, and the company defended on the ground of lapse; and it was held that it could not be claimed the company had in its hands, at the time the premium fell due, any funds belonging to the insured which it was obliged to apply on account of the premium.⁸ Though the general rule is the dividend should be first applied by the insurer to reduce interest on

¹ *Chicago L. Ins. Co. v. Warner*, 80 Oh. St. 156. See *Eddy v. Phoenix Mut. L. Ins. Co.*, 65 N. H. 27.

² *Ind. 7*; *Northw. Mut. L. Ins. Co. v. Fort*, 82 Ky. 269; *Girard L. Ins., etc., Co. v. Mut. L. Ins. Co.*, 97 Pa. St. 15; 106 U. S. 30.

³ *Brooks v. Phoenix Mut. L. Ins. Co.*, 16 Blatch, 182.

⁴ *Bulger v. Wash. L. Ins. Co.*, 63 Ga. 328.

⁵ *Guy v. Globe Ins. Co.*, 9 Ins. L. J. 466 (Va.). ⁷ *Wheeler v. Conn. Mut. L. Ins. Co.*, 82 N. Y. 543.

⁸ *Manhattan L. Ins. Co. v. Hoezle*, 44 Mut. L. Ins. Co. v. Girard L. Ins., Etc., Co., 100 Pa. St. 172.

money due, this rule may be changed by a custom of dealing with the insured, or by a contract, to apply the dividend first to the reduction of the principal.¹ A bonus deducted by an insurance company from a loan made by it to one of its insured cannot be regarded in any sense as money in the hands of the insurer applicable to the payment of premiums.² In New York, and Maryland, the Courts, however, have held that the insurer is not under any obligation to apply a dividend on a policy to the payment of the interest on the premium notes, or to the premium, unless he is so instructed or there exists a contract to that effect.³

364. Where the subject-matter of insurance is owned jointly in certain proportions, and the policy is charged agreeably to those proportions, the owners would be entitled to dividends in the same proportions.⁴

365. Questions sometimes arise as to who may be entitled to bonuses where the policy is the result of a marriage settlement, or is disposed of by will. Thus, where a settlement was construed to the effect that a policy effected in the names of trustees was itself settled, but that under the covenants and the rules of the company the husband was entitled to an option to have any bonus applied in reduction of premiums, and the husband continued to pay full premiums, it was held the bonuses on his death went to the trust as accretions.⁵ And where, under a settlement, the trustees took a joint policy on the lives of the husband and wife, the policy-money to be invested on the death of the longest liver for the children, and the premiums paid out of funds conveyed to the trustees for that purpose, and the wife conveyed her other estate including future acquisitions, the children, by the law of Scotland, took the bonuses in addition to the face value of the policy.⁶ Though a policy taken by a life tenant of a trust estate, under the impression he was under an obligation to do so, in the names of himself and the trustees for the benefit of the trust, with no view of being repaid for the pre-

¹ *Anderson v. St. Louis Mut. L. Ins. Co.*, 1 Flap, 559 (W. D. Tenn.). See *Ohde v. Northwestern Mut. L. Ins. Co.*, 4 Ins. L. J. 702 (Iowa). Though see *Northwestern Mut. L. Ins. Co. v. Fort*, 14 Ins. L. J. 26 (Ky.).

² *Smith v. Penn Mut. L. Ins. Co.*, 11 W. N. C. (Pa.) 295.

³ *Mut. F. Ins. Co. v. Miller Lodge*, 58 Md. 463; *Wheeler v. Conn. Mut. L. Ins. Co.*, 82 N. Y. 543.

⁴ *Boardman v. Gaillard*, 1 Hun (N. Y.), 217.

⁵ *Gilly v. Burley*, 22 Beav. 619.

⁶ *Re Burnett's Trustees*, 27 Sct. L. R. 798.

miums, would not entitle his representatives to be repaid the premiums, but they would be entitled to bonuses, as the insured had the option of taking them or of diminishing thereby the premiums.¹

366. A bequest of a policy carries with it the bonuses.² A bonus declared to a shareholder after his death, and two years after the date of his will in which he bequeathed his property to trustees for the benefit of his wife for life with remainder to his children, was held to go to his widow as income.³ A testator bequeathed to A. a leasehold for life with a policy entitling the holder to participate in profits, and the option of taking bonuses by way of augmentation or reduction of premiums, together with all bonuses and additions; with the direction that she should pay the future premiums, and if she should be married at his death, the house and policy should be settled on her and her children, and he gave the residue to B. He subsequently married, and by a codicil gave his wife all the income and annual proceeds of his estate for life and postponed the payment of all legacies vested in him till after her death, and, subject thereto, confirmed his will, and it was held the bonuses must be added to the capital and not in reduction of the premiums, and that the premiums were not payable out of the rents of the leasehold, but must be raised by a mortgage on the policy.⁴

367. Where a policy is assigned by way of security for a loan the right to bonuses would depend on the terms of the contract. Where it is a debtor's policy, and nothing is expressly agreed on as to bonuses, they would belong to the debtor on payment of the debt. Thus, in Scotland, a bond of annuity was granted by A., payable during his life, but redeemable on repayment, together with the assignment of a life-rent in certain entailed lands, in consideration of an advance by B. Thereupon B. insured A.'s life to the amount of the advance, the annuity being equal to the premiums and interest on the advances, and later assigned the policies and security to C., on payment by C. of the principal with a power in C. to take bonuses on the policy and account with A. It was held on A.'s death, and payment of the debt out of the policy moneys, that the transaction was a loan, and that the bonuses went to A.'s estate.⁵

¹ *Brown v. Browne*, 8 W. R. 726.

⁴ *McDonald v. Irvine*, 8 Ch. D. 101.

² *Roberts v. Edwards*, 9 Jur. n. s. See also *St. John's Mite Ass'n v. Buchly*, 6 Cent. R. 292 (D. C.).

³ *Johnson v. Ib.*, 15 Jur. 714.

⁵ *Shand v. Blaikie*, 31 Scot. Jur. 486.

PART II.

RIGHTS OF THE INSURER.

CHAPTER I.

CANCELLATION.

SECTION	SECTION
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368. The insurer, apart from an agreement to that effect, cannot at his pleasure cancel a contract of insurance, but he frequently reserves this right in the contract upon the performance of certain conditions. This right, however, is strictly construed, and it has been held that the insurer's option of cancellation does not entitle him to reduce the amount of a policy in the hands of a pledgee without the knowledge of the pledgor.¹ The conditions imposed upon the insurer must also be strictly performed.² Most of the

¹ West. Assur. Co. v. Stoddard, 88 Ala. 606. 46 Ill. 394; Lattan v. Royal Ins. Co., 44 N. J. L. 453; Runkle v. Cit. Ins.

² Albany City F. Ins. Co. v. Keating, Co., 6 Fed. R. 143 (S. D. Oh.).

clauses as to cancellation, found in policies of insurance, provide for notice on the part of the insurer, and this is a precedent condition.¹ In some of the States notice is required by statute on a cancellation.²

369. While a discretionary right to cancel cannot perhaps be delegated by a general agent, he may delegate to another the conveying of the notice.³ The secretary of the insurer would be a proper person for the insured to rely upon as to information of a cancellation on behalf of the company.⁴ Where the mail is selected as the agency in sending the notice its receipt must be shown.⁵ And where the policy provided for a cancellation by notice, "either personally or by mail" to the insured, it was held a notice sent, but not received, was insufficient.⁶ A letter-book copy of a letter purporting to have been written by a clerk, not called, is not competent to prove a cancellation by the sending of a notice, where there is no other proof, and its receipt is denied.⁷ Proof that the notice was prepared for immediate service on the day of its date, that it was found among the papers of the insured after his death a few days later, and after the loss which occurred before his death after the date of the notice, was held not sufficient proof that the notice had been received by him before the fire.⁸ Where the insurer asserts he had given the agent of the insured notice, the insured may show it was not received by him or by his agent for him.⁹

370. It has been held that the insured is entitled to notice of the insurer's intention to cancel a reasonable time before such cancellation will take place, when the policy is silent as to time of notice.¹⁰

¹ *King v. Enterprise Ins. Co.*, 45 Ind.

43; *Chase v. Phoenix Mut. L. Ins. Co.*,

67 Me. 85; *Massasoit Steam Mills Co.*

v. West. Assur. Co., 125 Mass. 110;

Dean v. Aetna L. Ins. Co., 2 Hun (N.

Y.), 358; *Butler v. Amer. Popular L.*

Ins. Co., 10 J. & S. (N. Y.) 342; *Von-*

wien v. Scot. Un. & Nat. Ins. Co., 22

Ib. 276; *Continen. Ins. Co. v. Busby*, 15

Ins. L. J. 736 (Tex.); *Mohr v. Oh. Ins.*

Co., 13 Fed. R. 75 (S. D. Oh.); *Cain v.*

Lancash. Ins. Co., 27 U. C. Q. B. 217,

453.

² *McDougall v. Provident Savings L.*

Assur. Soc., 64 Hun (N. Y.), 515.

³ *Runkle v. Cit. Ins. Co.*, 6 Fed. R.

143 (S. D. Oh.).

⁴ *Columbia Ins. Co. v. Masonheimer*,
76 Pa. St. 138.

⁵ *Farnum v. Phoenix Ins. Co.*, 83
Cal. 246.

⁶ *Mullen v. Dorchester Mut. F. Ins.*
Co., 121 Mass. 171.

⁷ *Whiting v. Miss. Val. Mfrs. Mut.*
Ins. Co., 76 Wis. 592.

⁸ *Lattan v. Royal Ins. Co.*, 45 N. J.
L. 453.

⁹ *Newark F. Ins. Co. v. Sammons*,
110 Ill. 166.

¹⁰ *McLean v. Republic F. Ins. Co.*, 3
Lans. (N. Y.) 421. See *Lattan v. Royal*

Ins. Co., 45 N. J. L. 453.

Notice after the loss is not in time.¹ What a reasonable time is would be for the jury under proper instructions.² The insurer's option to cancel "after seven days' notice given to the insured of their intention to do so," was maintained in Rhode Island, where on the thirteenth of a month, after postoffice hours, a notice was mailed stating the policy would be cancelled at noon on the twentieth of that month, and that from and after that date he would not be insured, which notice the insured received on the morning of the fourteenth.³ Where a receipt for interim insurance, headed Post-office Coaticooke (a small place, subject to be cut off from communication from other places during March by snow), reserved the right to the insurance office at Toronto to cancel within a prescribed time, "by causing a notice to be mailed to the applicant at the above postoffice," it was held a notice mailed (in March) within the time at Toronto, but not received in time for delivery by the post-office at Coaticooke until after the fire, was too late, as the contract provided the mailing must be at Coaticooke.⁴ Under the Statutory Condition No. 19, of the Ontario Fire Insurance Act⁵ the Court held that the insurer should inform the insured that the policy would be terminated at the expiration of the prescribed statutory period after service of the notice, and that a notice which in effect was an immediate cancellation was not valid.⁶

371. The notice of a cancellation must be unambiguous and must represent unconditionally a fixed determination, and not a mere expression of a desire.⁷ Where the insurer has the option of cancelling at any time, "on giving notice to that effect," the notice likewise must express a fact accomplished, not a desire.⁸ If the insurer notifies the insured of a wrongful cancellation, to make it effective the insured must agree to accept it as a cancellation.⁹ And the question of what is a reasonable time for the insured's accept-

¹ *Stebbins v. Lancashire Ins. Co.*, 13 Ins. L. J. 698 (N. H.); *Standard Oil Co. v. Amazon Ins. Co.*, 79 N.Y. 506.

² *Chadbourn v. German-Amer. Ins. Co.*, 31 Fed. R. 533 (S. D. N. Y.).

³ *Emmott v. Slater Mut. F. Ins. Co.*, 7 R. I. 567.

⁴ *Tough v. Provincial Ins. Co.*, 20 L. Can. J. 168.

⁵ R. S. O. c. 167, s. 114.

⁶ *Bank v. Brit. America Assur. Co.*, 18 Ont. R. 234.

⁷ *Petersburg Savings & Ins. Co. v. Manhat. F. Ins. Co.*, 66 Ga. 446.

⁸ *Van Valkenburgh v. Lenox F. Ins. Co.*, 51 N. Y. 465.

⁹ *Brooklyn L. Ins. Co. v. Bledsoe*, 52 Ala. 538.

ance of it is not entirely for the jury, but is a mixed question of law and fact.¹

372. Where the policy is silent as to whom the notice shall be sent, it should be sent to the insured.² Where the insured had taken a policy on credit, payable to a mortgagee, who later had it confirmed to himself as owner, and he in turn had it made payable to the plaintiff as mortgagee, and the insurer accepted the obligation of the original insured for the premium, it was held that, under the circumstances, the notice of cancellation for failure to pay the premium to the new owner and new mortgagee was not sufficient, but that it should have been sent also to the original insured.³ A stipulation for notice "to the insured or his representative," in a policy payable to A., was held sufficiently complied with by a notice to A.⁴ Notice to a general agent of the insured in the matter of insurance is sufficient.⁵ But the insurer is not justified in treating the insured's husband who had acted as her general agent, as such, after knowledge of a separation and of a suit by her for alimony, and that he is anxious to have the policy made payable to him.⁶ Notice to a special agent of the insured is not sufficient; as, for example, the broker or agent who had been simply authorized to procure the policy.⁷ The clause that the broker who procures the insurance shall be deemed the agent of the insured, has been held to be confined to the procuring of the policy, and not as authorizing him to receive notice of its termination.⁸ And the clause that the insurer may give notice of cancella-

¹ *Wilmot v. Charter Oak L. Ins. Co.*, 46 Conn. 483; *Broadwater v. Lion F. Ins. Co.*, 34 Minn. 464; *Rothschild v. Amer. Cent. Ins. Co.*, 74 Mo. 41; *Lange v. Lycom. F. Ins. Co.*, 3 Mo. Ap. 591; *Stilwell v. Mut. L. Ins. Co.*, 72 N. Y. 538; *Hermann v. Niag. F. Ins. Co.*, 100 Ib. 411;

² *Lond. & Lancash. F. Ins. Co. v. Turnbull*, 86 Ky. 230.

³ *Chadbourne v. German Amer. Ins. Co.*, 31 Fed. R. 533 (S. D. N. Y.).

⁴ *Mueller v. South Side F. Ins. Co.*, 87 Pa. St. 399.

⁵ *Stone v. Franklin F. Ins. Co.*, 105 N. Y. 543. See *Dibble v. N. Assur. Co.*, 70 Mich. 1.

⁶ *Manhat. L. Ins. Co. v. Smith*, 44 Oh. St. 156.

⁷ *Ins. Cos. v. Raden*, 87 Ala. 311; *Quong Tue Sing v. Anglo-Nevada Assur. Corp.*, 86 Cal. 566; *Ind. Ins. Co. v. Hartwell*, 100 Ind. 566; *Latoix v. Germania Ins. Co.*, 27 La. An. 113;

Mut. Assur. Soc. v. Scot. Un. & Nat. Ins. Co., 84 Va. 116.

tion to the assured, "or to the person who may have procured the insurance to be taken," has been held not to apply to one who acted as agent for both parties.¹ Evidence, on the part of the insurer, of a custom of insurers to give the notice to the agent of the insured, who procured the policy, has been held inadmissible.²

373. When the policy provides for a return of the premium paid on a cancellation, the tender of the premium is precedent.³ It is not necessary for a general agent to tender the premium in person, as it is merely a ministerial duty.⁴ But the tender must be actual and unconditional and must exhibit a present determination, a promise to pay or a request to call for the premium being insufficient.⁵ A due bill not accepted as payment,⁶ a credit on the company's books,⁷ or a statement that the money is held subject to the order of the insured,⁸ is therefore not sufficient. But the money need not, in all cases, be physically delivered to the insured, as where, after a surrender of the policy, the insured tells the agent of the insurer who also represents other companies, to try and get other insurance, and the agent keeps the money for the purpose.⁹

374. The return of a rateable proportion of the premium has been stated a condition precedent to a cancellation when the policy requires it. That is, it forms one of the acts made necessary by the contract to be performed by the insurer to effect a termination of the policy. But if the insured and insurer mutually agree to consider the policy unconditionally cancelled in point of fact, the return

¹ *Ins. Cos. v. Raden*, 87 Ala. 311.

² *Mut. Assur. Soc. v. Scot. Un. & Nat. Ins. Co.*, 84 Va. 116; *Grace v. Amer. Cent. Ins. Co.*, 109 U. S. 278; *Adams v. Mfrs. & Builders' F. Ins. Co.*, 17 Fed. R. 630 (D. R. I.).

³ *Ætna Ins. Co. v. Maguire*, 51 Ill. 342; *Peoria M. & F. Ins. Co. v. Botto*, 47 Ill. 516; *White v. Conn. F. Ins. Co.*, 120 Mass. 330; *Home Ins. Co. v. Curtis*, 32 Mich. 402; *Lattan v. Royal Ins. Co.*, 45 N. J. L. 453; *Van Valkenburgh v. Lenox F. Ins. Co.*, 51 N. Y. 465; *First Nat. F. Ins. Co. v. Issett*, 11 W. N. C. Pa. 558; *Home Ins. Co. v. Tighe*, 11 Ib. 15; *Continen. Ins. Co. v. Busby*, 15 Ins. L. J. 736 (Tex.).

⁴ *Runkle v. Citizen's Ins. Co.*, 6 Fed. R. 143 (S. D. Oh.).

⁵ *Hollingsworth v. Germania, Etc., Cos.*, 45 Ga. 294; *Ætna Ins. Co. v. Maguire*, 51 Ill. 342; *Nathorn v. Germania Ins. Co.*, 55 Barb. (N. Y.) 28; *Griffey v. N. Y. Cent. Ins. Co.*, 100 N. C. 417; *Runkle v. Citizen's Ins. Co.*, 6 Fed. R. 143 (S. D. Oh.); *Mohr v. Oh. Ins. Co.*, 13 Fed. R. 74 (S. D. Oh.).

⁶ *Home Ins. Co. v. Tighe*, 11 W. N. C. (Pa.) 15.

⁷ *Lattan v. Royal Ins. Co.*, 45 N. J. L. 453.

⁸ *Planters' Ins. Co. v. Walker Lodge*, 11 Reporter 142 (Tex.).

⁹ *Hillock v. Traders' Ins. Co.*, 54 Mich. 531.

of the premium is then no longer a precedent condition to the cancellation.¹ Thus, for example, the insured may accept the fact of cancellation, but permit the insurer to delay repaying him the premium.² Where credit is given for the premium, of course no tender is needed.³ And where a note was taken for the premium it would be unnecessary to credit on it the proportionate part of the unearned premium,⁴ or to return it.⁵ Nor is it necessary to return a pro rata of premium when the proper person to give the notice of cancellation to is the broker who procured the policy, and who, by a custom between him and the company, did not pay, but was charged with the premium and was to pay when it suited his convenience.⁶ The provision of the New York Revised Statutes⁷ which allowed a receiver to cancel, with assent, on refunding a proportion of the premium, was held not to apply to subsisting policies of life insurance, but only to fire, marine, or other insurance having a definitive term to run.⁸ As has been stated of notice, the tender should be made before a loss.⁹

375. Where the insurer is authorized to cancel for some specific cause, he must elect to do so if he desires to terminate the insurance, for if he does nothing the policy will subsist.¹⁰ Such phrases as "the directors shall be at liberty to terminate the risk," "or if for any other cause the company shall so elect, it shall be optional with it," give an absolute right to terminate the policy without stating the motive.¹¹ And its sufficiency cannot be inquired into.¹² The fact that the subject-matter is in greater danger of destruction from the peril insured against does not prevent the insurer from cancelling.¹³

¹ *Ætna Ins. Co. v. Weissinger*, 91 Ind. 297; *Hopkins v. Phoenix Ins. Co.*,

78 Iowa, 344; *Hillock v. Traders' Ins. Co.*, 54 Mich. 531; *Train v. Holland Purchase Ins. Co.*, 72 N. Y. 598.

² *Bingham v. Ins. Co. of N. A.*, 74 Wis. 498.

³ *Von Wien v. Scot., Etc., Ins. Co.*, 20 J. & S. (N. Y.) 490.

⁴ *Little v. Ins. Co.*, 38 Oh. St. 110.

⁵ *Ib. Mueller v. South Side F. Ins. Co.*, 87 Pa. St. 399.

⁶ *Stone v. Franklin F. Ins. Co.*, 105 N. Y. 543.

⁷ N. Y. R. S. 420, s. 75.

⁸ *People v. Security, Etc., Co.*, 78 N. Y. 114.

⁹ *Hollingsworth v. Germania, Etc., Ins. Cos.*, 45 Ga. 294; *M'Graw v. Germania F. Ins. Co.*, 54 Mich. 145; *Lancash. F. Ins. Co. v. Nill*, 4 Cent. R. 294 (Pa.).

¹⁰ *West. Horse, Etc., Ins. Co. v. Sheidle*, 15 Ins. L. J. 204 (Neb.).

¹¹ *Simpson v. Accidental Ins. Co.*, 2 C. B. n. s. 257; *Internat. L. Ins., Etc., Co. v. Franklin F. Ins. Co.*, 66 N. Y. 119.

¹² *Internat. L. Ins., Etc., Co. v. Franklin F. Ins. Co.*, *supra*.

¹³ *Home Ins. Co. v. Heck*, 65 Ill. 111.

376. The fulfilment of the conditions precedent to cancellation do not, however, cancel, but the insurer must not only go through the preliminaries of a cancellation, but must perform the act of cancellation. Thus, where the company was empowered to cancel by a vote of two-thirds of the directors present at any meeting for a sufficient cause, a general vote that all notes be collected in full, and the holders be notified that if they be not paid in thirty days their policies should be cancelled, and a notice sent to a member who did not pay or deliver his policy up to be cancelled, were held not to cancel the policy, as it was a mere notice to cancel.¹ A neglect of the agent to cancel when instructed to by his principal, the insurer, does not release the latter.² But the transmission to the insured of the fact by a special agent of the insurer, who was authorized to cancel on notice, is final, and a subsequent arrangement between him and the insured to let the policy stand is immaterial, as it would be a new discretionary act beyond the power of a special agent.³ A cancellation receipt signed by the insured, upon the statement that another policy had been procured in the place of the one cancelled, however, would be immaterial.⁴ The insurer would not be authorized to cancel or retain a policy sent to be corrected, for if the insurer should be unwilling to correct it he must return it in the same condition.⁵ If the charter directs a cancellation to be made on the books of the company, unless this be done a notice that the company would discontinue the risk is not enough, and the company could still assess.⁶ But where the by-laws of a mutual company provided that a member's liability should continue till the cancellation of his policy and erasure from the books of company, it was held that the company was relieved from liability on a loss after a voluntary surrender of policy without a formal cancellation by the actual erasure of his name from the books of the company.⁷

377. After the surrender of a cancelled policy the taking back of the policy by the insured cannot revive it, though it might be evi-

¹ *Lyman v. State Mut. F. Ins. Co.*, 14 Allen (Mass.), 329. See *Newark F. Ins. Co. v. Sammons*, 110 Ill. 166.

² *McLean v. Republic F. Ins. Co.*, 3 Lans. (N. Y.) 421; *Goit v. Nat. Protec. Ins. Co.*, 25 Barb. (N. Y.) 189.

³ *Springfield F. & M. Ins. Co. v. McKinnon*, 59 Tex. 507.

⁴ *Holden v. Putnam F. Ins. Co.*, 46 N. Y. 1.

⁵ *Chase v. Wash. Mut. Ins. Co.*, 12 Barb. (N. Y.) 595.

⁶ *Landis v. Home Mut. F. & M. Ins. Co.*, 56 Mo. 591.

⁷ *Farmers' Mut. Ins. Co. v. Wenger*, 90 Pa. St. 220.

dence to show that it had not been cancelled.¹ It has been held that the agent of an insurer cannot revive a policy cancelled by the company unless specially authorized.²

The exercise of the insurer's optional right to cancel has been held to be no defence to a surety for the payment of the premium note by the insured in an action to recover the unpaid part of the premium, though there was also a clause that, in case of loss, the premium or part due should be deducted from the amount to be paid by the insurer on the loss.³

The burden of proof of a cancellation is on the party setting it up.⁴

¹ *Train v. Holland Purchase Ins. Co.*,
62 N. Y. 598.

² *Hartford F. Ins. Co. v. Reynolds*,
36 Mich. 502.

³ *Irwin v. Nat. Ins. Co.*, 2 Dis. (Oh.)
68.

⁴ *Runkle v. Cit. Ins. Co.*, 6 Fed. R.
143 (S. D. Oh.); *Mohr v. Oh. Ins. Co.*,
13 Ib. 74 (S. D. Oh.).

CHAPTER II.

REINSURANCE.

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378. Where the insurer for some reason finds it convenient that another shall bear either in whole or in part the liability to the insured which he has assumed, he agrees with another insurer to assume the whole or a certain part of his liability as regards the insured, which is termed a contract of reinsurance.¹ The original insurer is termed the reinsured, and the new insurer the reinsurer. It may be stated as a general principle that where reinsurance is not forbidden by statute, a company authorized to make contracts of insurance may reinsure.² And a custom among underwriters in the city of New Orleans to divide risks and not to take the whole, which is always understood when the application is silent, was held valid.³ An insurer may reinsure the whole or only a portion of the risk he has undertaken.⁴ The fact that a reinsurance policy is limited to the excess of the original insurer's risk over a certain

¹ See Mr. Law's argument in *Andree v. Fletcher*, 2 D. & E. 162; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; *Hone v. Mut. Safety Ins. Co.*, 1 Sand. (N. Y.) 137; *Phila. Ins. Co. v. Wash- ington Ins. Co.*, 23 Pa. St. 250.

² *N. Y. Bowery F. Ins. Co. v. N. Y. F. Ins. Co.*, 17 Wend. (N. Y.) 359.
³ *La. Mut. Ins. Co. v. N. O. Ins. Co.*, 13 La. An. 246.
⁴ *Ins. Co. of N. A. v. Hibernia Ins. Co.*, 140 U. S. 565.

amount, does not prevent the original insurer from reinsuring elsewhere within that amount.¹ Nor would a certain local custom in a town affect a contract of insurance made elsewhere.² Where the company was by a statute to do no more business as an insurance company, it was held this did not prevent it from indemnifying itself by reinsuring its risks already assumed.³ Where the power was given to take risks against fire on all kinds of property, "and reinsure themselves," it was contended this restricted its powers to merely reinsuring themselves; but it was held the words were cumulative and that the power to make contracts of insurance involved the power to effect reinsurances.⁴ In Iowa, it was held a contract to assume absolutely all risks taken by another was not the debt or default of another, and not, therefore, within the Statute of Frauds.⁵ Though in Louisiana, the contrary was held.⁶

379. Reinsurance in respect of property is a contract of indemnity between the original and a collateral insurer, by which the first is indemnified, in whole or in part, by the latter as to the risk he has undertaken in respect of the subject insured.⁷ The liability of the original insurer is the interest in the reinsurance.⁸ And a contract by one company to make good to another "all loss and damage caused by fire to the property by it insured, according to the terms and conditions of its policy, and the said several renewals thereof," is not a contract of guarantee, but of reinsurance, and therefore *infra vires* the powers of an ordinary insurer.⁹ The reinsurance may be in an amount equal to or less than the original insurance, but it cannot be on a greater amount, and where nothing is said it would probably be assumed to be the same risk.¹⁰ Where an original

¹ *Ins. Co. of N. A. v. Hibernia Ins. Co.*, 140 U. S. 565. *Hone v. Mut. Safety Ins. Co.*, 1 Sand. (N. Y.) 137.

² *Ib.*

³ *Davenport F. Ins. Co. v. Day*, 11 Ins. L. J. 174 (Iowa).

⁴ *Fame Ins. Co.'s Ap.*, 83 Pa. St. 396.

⁵ *Bartlett v. Fireman's Fund Ins. Co.*, 77 Iowa, 155.

⁶ *Egan v. Fireman's Ins. Co.*, 27 La. An. 368.

⁷ See Mr. Law's argument in *Andree v. Fletcher*, 2 D. & E. 162; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443;

⁸ *N. Y. Bowery F. Ins. Co. v. N. Y. F. Ins. Co.*, 17 Wend. (N. Y.) 359; *Yonkers & N. Y. F. Ins. Co. v. Hoffman F. Ins. Co.*, 6 Rob. (N. Y.) 316; *Phila. Ins. Co. v. Wash. Ins. Co.*, 23 Pa. St. 250; *Del. Ins. Co. v. Quaker City Ins. Co.*, 3 Grant (Pa.), 71.

⁹ *Cannon v. Home Ins. Co.*, 53 Wis. 585.

¹⁰ *Phila. Ins. Co. v. Washington Ins. Co.*, 23 Pa. St. 250.

insurer applied for reinsurance, describing the insurance as in the application and policy it had issued, and the reinsurer granted a policy to the reinsured "on their interest as insurer under their policy" issued; if the insurer's defence of misrepresentation in a suit by the original insurer is not successful, the reinsurer cannot set up misrepresentation by the reinsured; for he simply had applied for a reinsurance on the same risk he had subscribed, and the reinsurer had agreed to indemnify him against that risk, as regards which the Court had found there had not been misrepresentation on the part of the insured.¹ But where the contract limits the location of the risks to certain localities, there can be no recovery on a risk erroneously stated to be within such, but in reality outside.²

380. A policy of reinsurance may be valid, though the contingency insured against has happened before the policy issued, if the parties are ignorant of it.³ It is not always clear what period the policy of reinsurance is intended to cover. Seemingly it would cover the same term as the original policy, if nothing appears to show a contrary intent, and the premium is apparently based on such a theory.⁴ Thus, where a life policy issued on February 24th for a year, with the right of renewal, and a reinsurance policy for a year issued on and was dated May 31st, the premium being based on a year's risk, it was held to have a retrospective force and to run from the preceding February 24th, and therefore to cover a death which had occurred before its issue in the early part of May.⁵ In *Giffard v. Queen Ins. Co.*,⁶ the same rule was applied, though there the policy was antedated.

381. There must exist a mutuality in the contract of reinsurance, as in other contracts, but a policy taken by an agent may afterwards be ratified by his principal.⁷ Where the policy is issued "for whom it may concern," it can only be taken advantage of by one who can show he was one of the class for whom it was intended, and

¹ *Jackson v. St. Paul F. & M. Ins. Co.*, 99 N. Y. 124. *fard v. Queen Ins. Co.*, 1 Han. (N. B.) 432.

² *Lond. & Lancash. F. Ins. Co. v. Lycoming F. Ins. Co.*, 13 Ins. L. J. 845 (Pa.).

⁴ See *Ib.*

⁵ *Phila. L. Ins. Co. v. Amer. L. & Health Ins. Co.*, 23 Pa. St. 65.

³ See *Phila. L. Ins. Co. v. Amer. L. & Health Ins. Co.*, 23 Pa. St. 65; *Gif-*

⁶ 1 Han. (N. B.) 432.

⁷ *United L. F. & M. Ins. Co. v. Ins. Co. of N. A.*, 42 Ind. 588.

who had expressly or impliedly authorized its issue.¹ Where payment of the premium is made precedent, the contract will not be complete till tender is made.² And evidence of a custom among agents to credit each other for premiums and settle at the end of the month, of which it did not appear the reinsurer who had dealt through an agent was aware of and who besides had instructed his agent otherwise, was held inadmissible.³ It is a matter of contract how far the conditions of the original insurance shall apply to the new policy.⁴

382. The reinsurer is entitled at least to the same degree of accurate information as the original insurer,⁵ as to the facts likely to influence his judgment in taking or refusing the risk. A representation as an inducement to take the risk to the effect that the reinsured intended to retain part of the risk, which he wholly got rid of by a further reinsurance, was held to avoid the policy.⁶ But a statement that a vessel "was only insured for £1000" was held not untrue though another office had issued a policy on it, unknown to the reinsured.⁷ And it has been decided an underwriter who has subscribed a policy "on goods" may reinsure by the same description without stating it to be a reinsurance.⁸ Whether the declaration of health in the old policy should be taken as the basis of the new contract, or a new one would be required at the issue, would depend on the terms of the contract;⁹ though in *Foster v. Mentor L. Assur. Co.*,¹⁰ it appears that evidence without objection was given of a custom on reinsurance to confine declarations of health to the time of the original policy. If the reinsurer chooses to act on his own judgment in taking the risk, a misstatement of the rate in the original insurance would not be material.¹¹ An oral statement of an

¹ *Alliance M. Assur. Co. v. La. Ins. Co.*, 8 La. 1.

² *Western Assur. Co. v. Provincial Ins. Co.*, 5 Ont. Ap. 190.

³ *Ib.*

⁴ See *Foster v. Mentor L. Assur. Co.*, 3 E. & B. 48.

⁵ *N. Y. Bowery F. Ins. Co. v. N. Y. F. Ins. Co.*, 17 Wend. (N. Y.) 359; *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485; *People's Ins. Co. v. Hart. F. Ins. Co.*, 1 Ins. L. J. 875 (N. D. Cal.).

⁶ *Trail v. Baring*, 4 Giff. 485.

⁷ *Anderson v. Pacific F. & M. Ins. Co.*, 21 L. T. N. S. 408.

⁸ *Mackenzie v. Whitworth*, 1 Exch. D. 36.

⁹ See *Foster v. Mentor L. Assur. Co.*, 3 E. & B. 48.

¹⁰ 3 E. & B. 48.

¹¹ *Can. F. & M. Ins. Co. v. North. Ins. Co.*, 2 Ont. Ap. 373.

intention as to future conduct has been held immaterial.¹ But permission by the reinsured to carry hazardous goods for an additional rate will avoid, where there was an arrangement between the companies that the reinsurer should receive the same rate of premiums as the reinsured, and such was the custom between the companies.²

383. Where a policy of reinsurance was provided to be subject to "the same specifications, terms, and conditions" as the original policy, it was held that a change in the rate of the premium on a renewal was not a violation of the clause.³ Where the ordinary form of policy was used on a reinsurance, which contained a condition that no action was to be had till after an award as specified, fixing the amount of the claim, as well as a condition as to time for suit, it was held they were not applicable to the contract of reinsurance.⁴ A condition in the original policy that is void could not be relied upon by the reinsurer.⁵ On a loss the reinsured must furnish proof of loss analogously to the insured.⁶ Where an ordinary policy is used on a reinsurance, except that the words of the policy are "reinsured" instead of "insured," the proofs of the party originally insured, duly transmitted by the reinsured to the reinsurer, may fulfil the condition.⁷ Where the policy of reinsurance stipulated that the reinsurance was part of the sum or sums insured by the original insurer, "and to be subject to the same risks, valuations, conditions, and mode of settlements as are or may be adopted by said company," it was held this dispensed with proofs of loss and made the reinsured's adjustment final as to the amount of loss.⁸ Proofs offered by the reinsured must, as in other cases, be objected to within a proper time, or their defects will be waived.⁹

384. There is no privity of contract between the insured and the reinsurer.¹⁰ In *Carrington v. Commercial F. & M. Ins. Co.*,¹¹ the

¹ *Prudential Assur. Co. v. Aetna L. Ins. Co.*, 23 Fed. R. 438 (D. Conn.).

² *St. Nicholas Ins. Co. v. Merch. Mut. F. & M. Ins. Co.*, 10 Ins. L. J. 137 (N. Y.).

³ *Can. F. & M. Ins. Co. v. North. Ins. Co.*, 2 Ont. Ap. 373.

⁴ *Jackson v. St. Paul F. & M. Ins. Co.*, 99 N. Y. 124.

⁵ *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443.

⁶ *Yonkers & N. Y. F. Ins. Co. v. Hoffman F. Ins. Co.*, 6 Rob. (N. Y.) 316.

⁷ *N. Y. Bowery F. Ins. Co. v. N. Y. F. Ins. Co.*, 17 Wend. (N. Y.) 359.

⁸ *Consolidated Real Estate & F. Ins. Co. v. Cashow*, 41 Md. 59.

⁹ *Ex parte Norwood*, 3 Biss. 504 (N. D. Ill.).

¹⁰ *Strong v. Phoenix Ins. Co.*, 62 Mo. 389; *Price v. St. Louis Mut. L. Ins. Co.*,

¹¹ 1 Bos. (N. Y.) 152.

A. Co. having issued a number of policies, agreed with the B. Co. that the latter should reinsure the former upon the above policies, the loss, if any, payable to the "assured," upon the same terms and conditions, and at the same time, as contained in the original policies; reinsured from 30th November, 1854, to 12 o'clock, at noon, to the expiration of the policy; it was held to be an ordinary contract of reinsurance, and that the insured could not sue on it, as the "assured" from the context meant the reassured. By an agreement with the insured an insurer may of course insure the risk with another insurer, so as to substitute that other's liability for his own, by virtue of which contract the insured may recover directly against the new insurer. But it is suggested, that though this is termed a reinsurance, it is rather a substitution of a new for the original insurer, and a complete novation of the original contract, which is altogether different from an ordinary contract of reinsurance.¹ The reinsured may on the loss proceed against the reinsurer before paying the insured.² And an agreement by the reinsurer to pay *pro rata* at such times and in such manner as the reinsured "may pay," means to pay when the reinsured was "liable to pay," and that the latter may sue as soon as a claim arises.³ So the clause in the reinsurance policy to pay "*pro rata* at the same time with the reinsured" was held to mean the time the reinsured was liable, not that one should precede the other, or that both should pay together.⁴ Where a condition provided, "Reinsurance in case of loss to be settled in proportion as the sum reinsured shall bear to the whole sum covered by the reinsured company," and a clause appeared, "Loss, if any, payable *pro rata* with the reinsured," it was held the latter clause meant the loss was payable by the reinsurer *pro rata* with the loss payable by the reinsured, and does not mean at the same time with.⁵

3 Mo. Ap. 262; Carrington v. Commer. 9 Ind. 443; Gantt v. Amer. Cent. Ins. F. & M. Ins. Co., 1 Bos. (N. Y.) 152; Co., 68 Mo. 503; Fame Ins. Co.'s Ap., Travellers' Ins. Co. v. Cal. Ins. Co., 45 83 Pa. St. 396.

N. W. 703 (N. Dak.); Del. Ins. Co. v. 3 Fame Ins. Co.'s Ap., 83 Pa. St. Quaker City Ins. Co., 3 Grant (Pa.), 396.

71.

⁴ Blackstone v. Alemannia F. Ins.

¹ See Giffard v. Queen Ins. Co., 1 Co., 56 N. Y. 104.

Han. (N. B.) 432.

⁵ Norwood v. Resolute F. Ins. Co.,

² Eagle Ins. Co. v. Lafayette Ins. Co., 4 J. & S. (N. Y.) 552.

385. In America the reinsurer is usually liable for what the re-insured may legally be bound.¹ But this does not mean what the reinsured may actually pay. Thus, if by some arrangement the re-insured is released from his full legal liability, that would not affect the reinsurer.² And it has been held, where the reinsurer after a loss and after the subsequent insolvency of the reinsured bought up some of the policies at a discount, that it was a legal investment and not against public policy.³ So a *pro rata* clause in a policy of reinsurance to pay *pro rata* at the same time with the insured has been held to mean to pay *pro rata* what the reinsured is liable for, not what it may actually pay.⁴ And a usage to limit the contract of reinsurance was held inadmissible.⁵ Consequently the insolvency of the reinsured would not affect the liability of the reinsurer.⁶ Nor would the insured have a lien or preference on the reinsurance money, but the same is a fund for the general creditors of the reinsured.⁷ Nor would the above *pro rata* clauses change the rule.⁸ In Illinois, however, a different rule prevails, and the liability of the reinsurer appears to depend on what the reinsured may actually pay.⁹ And in England, reinsurance seems to be strictly a contract of indemnity, and a reinsurer is not liable till proof of actual payment by the reinsured.¹⁰

386. In a suit by the reinsured against the reinsurer, the latter may make all the defences that the former is entitled to make against the insured.¹¹ Though it has been decided that if the reinsured

¹ Del. Ins. Co. v. Quaker City Ins. Co., 1 Bos. (N. Y.) 152; Herckenrath Co., 3 Grant's Cas. (Pa.) 71.

² Strong v. Amer. Cent. Ins. Co., 4 Mo. Ap. 7.

³ Hovey v. Home Ins. Co., 3 Ins. L. J. 815 (S. D. Oh.).

⁴ *Ex parte* Norwood, 3 Biss. 504 (N. D. Ill.).

⁵ Hone v. Mut. Safety Ins. Co., 1 Sand. (N. Y.) 137.

⁶ Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443; Cashau v. N. W. Nat. Ins. Co., 5 Biss. 476 (E. D. Wis.); Blackstone v. Alemannia F. Ins. Co., 56 N. Y. 104; Strong v. Amer. Cent. L. Ins. Co., 4 Mo. Ap. 7.

⁷ Carrington v. Commer. F. & M. Ins. Co., 1 Bos. (N. Y.) 152; Herckenrath v. Amer. Mut. Ins. Co., 3 Barb. Ch. (N. Y.) 63; Goodrich's Ap., 1 Cent. R. 430 (Pa.).

⁸ *Ex parte* Norwood, 3 Biss. 504 (N. D. Ill.); Cashau v. Northw. Nat. Ins. Co., 5 Ib. 476 (D. Wis.).

⁹ Ill. Mut. F. Ins. Co. v. Andes Ins. Co., 67 Ill. 362.

¹⁰ See *re* Athenæum L. Assur. Soc., 1 John. Ch. 633.

¹¹ Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443; Merch. Mut. Ins. Co. v. N. O. Mut. Ins. Co., 24 La. An. 305; Gantt v. Amer. Central Ins. Co., 68 Mo. 503; Hastie v. De Peyster, 3 Caines (N. Y.), 190; Del. Ins. Co. v. Quaker

cannot be held, the reinsured will be discharged.¹ The reinsurer would not be bound, without notice, by a compromise between the insured and the reinsured.² And a notification by the reinsured of an intention to pay was held not to preclude the reinsurer from defending on a suit by the reinsured, though he did not answer the notice.³ As a voluntary payment by the reinsured will not bind the reinsurer, the former, unless he first gets paid by the latter, should notify the latter of a suit brought by the insured, to enable the reinsurer to participate in it, in which case the reinsurer would be bound by the judgment obtained *bond fide*.⁴ Or if the reinsured do not notify the reinsurer, he should at least raise every technical defence in the suit.⁵ And it was to avoid this inconvenience and delay and peril that the French policies of reinsurance authorized the original insurers to make, *bond fide*, a voluntary settlement and adjustment of the loss, which should be binding upon the re-assurers.⁶

387. An agreement between the reinsurer and reinsured that the latter should employ counsel to defend a suit, and, if successful, to pay a *pro rata* of fees, costs, etc., and in case of failure, to pay his share of the judgment, does not alter the reinsurance contract, but merely makes the reinsured his agent for the purpose of suit; nor does such an agreement establish a trust, for the reinsurer could come in at any time and defend.⁷ Where the two companies agree to resist the claim, and that the reinsured should conduct the suit, obviously the latter cannot compromise without notice and the consent of the reinsurer.⁸ But where after an agreement to de-

City Ins. Co., 3 Grant's Cas. (Pa.) 71; Jackson v. St. Paul F. & M. Ins. Co., N. Y. State M. Ins. Co. v. Protec. Ins. 99 N. Y. 124.

Co., 1 Story, 458 (D. Mass.).

² N. Y. State M. Ins. Co. v. Protec.

¹ Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443.

Ins. Co., 1 Story (D. Mass.), 458, 460; F. Ins. Ass'n v. Can. F. & M. Ins. Co.,

³ Commer. Un. Assur. Co. v. Amer. Cent. Ins. Co., 68 Cal. 430.

2 Ont. R. 481.

⁴ Nat. M. Ins. Co. v. Halfey, 5 Vict. L. R. 226.

⁵ See 1 Emerigontraité Assurances, ch. 11, sec. 9; Pothier, d'Assurance, 60; 2 Valin Com., liv. 3, tit. 6, art. 20.

⁶ Commer. Un. Assur. Co. v. Amer. Cent. Ins. Co., 68 Cal. 430; Gantt v.

⁷ Gantt v. Amer. Cent. Ins. Co., 68 Mo. 503. See also Strong v. Amer.

Strong v. Phoenix Ins. Co., 62 Mo. 289; Central L. Ins. Co., 4 Mo. Ap. 7.

⁸ Ib.

pend, etc., the reinsured, after notice to the reinsurer, compromises and assigns his claim against the reinsurer, it was held to be valid, there being no evidence of fraud; and in any event, the onus to show fraud would be on the reinsurer, and the fact of fraud for the jury.¹

¹ Strong v. Amer. Cent. L. Ins. Co., 4 Mo. Ap. 7.

CHAPTER III.

NOVATION AND AMALGAMATION.

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388. Novation is an agreement between a debtor and a third party, with the creditor's assent, that the third party shall assume the debtor's position to the creditor, and the debtor be released from his obligations to the creditor. As far as insurance is concerned, it is the undertaking of the insurer's obligations by a third party, and a release of the former's liabilities to the insured, with

the latter's express or implied consent. It differs from an ordinary contract of reinsurance, for in that there is no privity between the reinsurer and the insured, and no release of the original insurer.¹ Nor is it analogous to a contract of guarantee or suretyship, for there is a substitution of a new and complete release of the old debtor. The term amalgamation means the consolidation of business by one insurer with another.

389. An insurer may with the assent of his insured transfer his liability on a policy to another insurer,² and companies are frequently authorized to transfer and amalgamate. But to bind the policyholders such power must be shown.³ For while, as has been stated, an insurer may, without any special authority, effect contracts of reinsurance as an incident and convenience in its business,⁴ it is submitted a company would not be justified, without special authority, in closing its business and reinsuring all its risks, *en bloc*, in another company. For the power to insure lives and to grant annuities on lives committed to the directors of an insurance company, implying as it does skill and care on their part in selecting lives, cannot be contended to authorize the taking over *en masse*, by the executive of one insurance company, of all the insured lives and all the annuity contracts of another company selected and entered into by the executive, not of the first company, but of the other company.⁵ Therefore the transferee's power to take a business, *en bloc*, on a transfer or amalgamation, and subsequently carry it on, whether such action may or may not constitute a novation, must be affirmatively shown.⁶ Nor would a special authority to reinsure raise the implication of a capacity to do this, for it is safe to say where the legislature intended to give a company the power to close its business, to dispose of its assets, and to transfer its policies, *en bloc*, to another company, it would do so under some other grant than the mere power to reinsure.⁷

¹ See *ante*, §§ 379, 384, 385.

D. 679; *Re Era Assur. Soc.*, 2 J. & H.

² See *Giffard v. Queen Ins. Co.*, 1

400.

Han. (N. B.) 432.

³ See *Coghlan's Case*, *Reilly*, *Eur.*

⁴ *Indemnity Case*, *Reilly*, *Alb. Arb.*

Arb. 46; *Blundell's Case*, *Ib.* 84.

25.

⁵ *Ante*, § 378.

⁶ *Price v. St. Louis Mut. L. Ins. Co.*,

3 Mo. Ap. 262; *Barden v. St. Louis*

⁷ *Indemnity Case*, *Reilly Alb. Arb.*

Mut. L. Ins. Co., 3 *Ib.* 248. See also

25. See *Ernest v. Nicholls*, 6 H. L. C.

People v. Empire Mut. L. Ins. Co., 92

400; *Brit. Nat. L. Assur. Assoc.*, 8 Ch.

N. Y. 105.

390. Neither can the executive of an insurance company transfer its charter to another company against the voice of dissentient shareholders.¹ Therefore a dissentient policyholder may object to a transfer of business and an authorized reinsurance *en bloc*.² And a policyholder whose policy made the funds of the company liable for payment on the contingency and for profits was held entitled to restrain an unauthorized transfer without first providing for his policy.³

391. But though a dissentient policyholder may have a remedy in equity, by injunction or otherwise, against a company attempting an illegal transfer, yet it is submitted an illegal transfer does not constitute a breach of contract on a current policy for which an action at law would lie, if it does not appear that by the amalgamation the company has been disabled from paying on the policy. For it can hardly be said that there is an implied obligation to continue a business and keep available funds in the absence of a statute, and an amalgamation simple does not create an impossibility of payment in the future. For *non constat* that the amalgamation will not add to the insurer's business and put him in a better position to pay in the future. The insured, it is true, may be afraid he will not be paid, but the mere fear of a loss will not give a right to damages.⁴ And in any event, how could an amalgamation be a cause of action at law? for, if not authorized, it is *ultra vires* and of no effect; if authorized, the policyholder has no ground of complaint.⁵

392. Apparently the New York,⁶ and Federal Courts,⁷ have taken a different view, holding there is an implied obligation to continue the business, and that on an unauthorized amalgamation a breach arises, though there is at the time no contractual liability on the policy for which an action at law will arise for damages.

393. Under the English Life Companies' Act of 1870, a life

¹ Upton v. Jackson, 4 Ins. L. J. 189 (W. D. Mich.).

² Price v. St. Louis Mut. L. Ins. Co., 3 Mo. Ap. 262; Barden v. St. Louis Mut. L. Ins. Co., 3 Ib. 248. See People v. Empire Mut. L. Ins. Co., 92 N. Y. 105.

³ Kearns v. Leaf, 1 H. & M. 681.

⁴ See King v. Accumulative L. Fund, Etc., Co., 3 C. B. n. s. 151; Solvency Guarantee Co. v. York, 3 H. & N. 588.

⁵ Solvency Guarantee Co. v. York, 3 H. & N. 588.

⁶ See *Re Empire Mut. L. Ins. Co.*, 64 How. Pr. (N. Y.) 51.

⁷ Lovell v. St. Louis Mut. L. Ins. Co., 111 U. S. § 264. The measure of damage in such a case was stated to be the amount of premiums paid less the value of the insurance of which he has enjoyed the benefit.

business cannot be transferred unless the company, independently of the Act, is authorized to do so, the fourteenth section not being enabling.¹ And now in England a life company cannot transfer or amalgamate without the assent of the High Court of Justice, on petition in the Chancery Division.²

394. In *Beaver, Etc., Mut. F. Ins. Co. v. Trimble*,³ the A. Co. had divided its business into two branches; one called the Mercantile, in which both cash and mutual policies were effected, and the other the Farmers' branch, which was exclusively mutual. The defendant had insured in the former on the mutual plan, after which that company amalgamated with the B. Co., and the directors of the new company transferred all cash policies in their Farmers' branch to the Mercantile branch, crediting the latter branch at the same time with the estimated value of all unexpired cash policies. A special Act⁴ authorized the directors of the B. Co. to "make arrangements with any mutual or other insurance company for the reinsurance of risks on such conditions with respect to payment of premiums thereon as may be agreed between them," which was virtually the same in principle as the general Act of 27 & 28 Vict., c. 38, s. 8, passed the same session, and which provided that "Any mutual insurance company may effect contracts of insurance for the purpose of reinsurance with any other insurance company, etc.," which applied of course to the A. Co. It was held that the company's action was illegal, as it was a reinsurance, and not with a "mutual or other insurance company" as the Act intended, and therefore that the defendant could not be assessed for losses on policies so transferred.

395. In England a mutual company may be amalgamated with, and its business transferred to, another company under section 161 of the Companies' Act of 1862.⁵ And an unregistered company, which has no power under its deed of settlement to sell and transfer its business to another company, may do so by registering under this Act and then voluntarily winding up and directing the liquidator to carry out the agreement.⁶

¹ *Re Sovereign L. Assur Co.*, 58 L. J. R. Ch. n. s. 811.

⁴ 27 & 28 Vict., c. 99, s. 10.

⁵ *Southall v. Brit. Mut. L. Assur.*

² 33 & 34 Vict., c. 61, s. 14-15; *Porter on Ins.* 410.

Soc. 6 Ch. Ap. 614.

⁶ *Ib.*

³ 23 U. C. C. P. 252.

396. Where the deed of an unincorporated company in England, had no provisions for a sale or transfer of business, but provided the proprietors might alter, amend, etc., its laws, etc., and that resolutions to transfer were duly passed, it was held a policy-holder could not object to a transfer.¹ In New York, it has been held that the fact that an insurance company is empowered to reinsure its risk, or dissolve, would not impliedly allow it to wind up and transfer its risks to a new insurer against the desires of its policy-holders,² and that the omission to protest is not material, as the insurer is impliedly bound to carry on its business and remain solvent.³

397. But an *ultra vires* amalgamation or transfer may in many cases be ratified. Thus, in *Indemnity Case*⁴ it was held an *ultra vires* amalgamation by directors can be maintained where it is clearly brought home to the transferee shareholders, by reports and accounts of annuities and policies, as to indemnity up to the amounts on their shares. But it must be very clearly proved to have been brought home also to them, if it is designed to create a liability beyond the amount of their shares in the company. Where an illegal transfer is made by directors without the consent of the shareholders, if the latter subsequently participate in the new business, or silently allow it to go on, there will be an estoppel.⁵

398. The terms of a permission to transfer and amalgamate must be strictly followed by the transferring company.⁶ The power to dissolve, on the directors paying all demands, etc., and obtaining from the new insurer an undertaking to satisfy the remainder of the claims arising from insurance, etc, when the time shall arrive therefor, and on causing to be transferred to the new insurer, "so much of the funds or property of the company as shall be agreed upon between the contracting parties as will be sufficient, etc., to enable the company, from whom . . . the undertaking shall have been obtained to comply therewith," and on making such other arrangements as the directors shall think fit, was held to be a matter with which the policy-holders had no concern, but that the contract-

¹ *Re Argus L. Assur. Co.*, 39 Ch. D. 571.

² *People v. Empire Mut. L. Ins. Co.*, 92 N. Y. 105.

³ *Ib.* See *ante*, § 391; *post*, § 520.

⁴ *Reilly Alb. Arb.* 17, 28.

⁵ *McKenna v. State Ins. Co.*, 73 Iowa, 453. See *Laws*, c. 210, s. 2.

⁶ *Ernest v. Nicholls*, 6 H. L. C. 400; *Re Merch. & Tradesman's Assur. Soc.*, 9 Eq. Cas. 694; *Indemnity Case*, *Reilly Alb. Arb.* 25.

ing parties were the two insurers.¹ It has been held that a clause in the agreement of amalgamation providing that part of the purchase-money shall be paid to the directors of the selling company by way of bonus, openly on the face of the agreement, would not invalidate the agreement, though it might do so if a secret arrangement.²

399. Where notice is required it is precedent. But where notice was required, and it appeared on a petition for an amalgamation under the Acts of 1870 and 1872 that the holders of two policies together amounting to much less than one-tenth of the whole amount insured were resident abroad, and could not have received notices of the scheme, which had been duly posted in time, ordinarily, for an expression of assent or disapproval, the Court allowed it, without waiting for their assent, their remedy against the transferrer being preserved by sec. 7 of the Life Assurance Companies' Act of 1872.³

400. Where the amalgamation is permitted without the assent of the policyholders, this, properly speaking, is not in any sense a novation or a *tripartite* contract, in which the insured is a party, and the question in such cases would simply be, whether the insurer had done what was necessary for him to do, as provided either in his charter, deed of settlement, or a statute in order to take this step.⁴

401. It is, however, frequently provided that the policyholders shall generally consent to the proposed amalgamation, or that each policyholder shall individually assent.⁵ Where a company was empowered to amalgamate under resolutions at meetings, and at a regular meeting at which a majority was present an amalgamation was duly agreed to, a policyholder who shared in the profits and had a vote was held to have no ground of complaint.⁶ But it was held that an overt act by which "the members" of several companies are made a new corporation, which "shall not affect the legal rights of any person," which is to take effect "when accepted by the members thereof," does not constitute a member of one of the old companies,

¹ Carr's Case, 33 Beav. 542.

² Southall v. Brit. Mut. L. Assur. Soc., 6 Ch. Ap. 614.

³ Re Lond. & Southwark Ins. Corp., 42 L. T. N. S. 247.

⁴ See Hort's Case, 1 Ch. D. 307; Dowse's Case, 3 Ch. D. 384.

⁵ See Re India & Lond. Assur. L. Co., 7 Ch. Ap. 651. See Harman's Case, 1 Ch. D. 326.

⁶ Harman's Case, 1 Ch. D. 326.

who does not expressly assent a member of the new body, though a majority assent.¹

402. Where the transfer is not authorized without the consent of each policyholder, or where it is unauthorized and there are dissentient policyholders, the question of assent is one of evidence, and the test of a policyholder's assent to a transfer is dependent on the commission of, or omission to do such an overt act as will lead the party with whom he deals to infer unequivocally, perhaps at least reasonably, that he has intended to transfer his contract to another.²

What act of commission or omission will constitute such an intention is difficult to define with any accuracy. Practically it must generally consist in drifting into dealings with a new insurer, paying premiums, taking receipts, accepting bonuses, etc., a failure to protest with regard to the footing upon which the premiums are paid, etc.³

403. Strict proof, however, though slight, is required.⁴ The mere payment of premiums to the transferee, though evidence of, is not alone sufficient to establish, a novation.⁵ For the premium may be only paid under protest to keep on foot the old policy and prevent a lapse.⁶ Besides which, it is frequently stipulated in the agreement of transfer that the policyholder may keep on foot the policy by payment of premiums to the new company.⁷ As in *Griffith's Case*,⁸ where a policyholder received a circular announcing the amalgamation, and that new policies of the new company might be substituted, or the old ones kept on foot, by paying the premiums to the new company; and at the request of the secretary sent in his policy to be indorsed, which was returned indorsed, but declined to sign the form sent him by the secretary, by which he was to assent to the transfer of the liability to the new company, it was held,

¹ *Hamilton Mut. Ins. Co. v. Hobart*, 266; *Conquest's Case*, 1 Ch. D. 334; *2 Gray (Mass.)*, 543. *Blundell's Case*, Reilly Arb. 84:

² See *Coghlan's Case*, Reilly Arb. 46; *Dorning's Case*, Reilly Arb. 148. *Relfe v. Columbia L. Ins. Co.*, 10 Mo. Ap. 150; *Reese v. Smyth*, 95 N. Y. 645.

³ See *Dorning's Case*, *supra*.

⁴ *Re Family Endowment Soc.*, 5 Ch. Ap. 118.

⁵ See *Dorning's Case*, *supra*; *Wood's Case*, Reilly Arb. 54; *Dupre's Case*, *ib.* 236; *Clegg's Case*, *ib.*

⁶ See *Wood's Case*, Reilly Arb. 54; *Relfe v. Columbia L. Ins. Co.*, *supra*; *Reese v. Smith*, *supra*.

⁷ *Dorning's Case*, Reilly Arb. 144.

⁸ 6 Ch. Ap. 376.

though he continued to pay premiums to the new company, not to be a novation. Neither would a novation be established against the executor of the endowment contract-holder, on payment of a premium to the transferee company, the last falling due after the amalgamation, by the bankers of the widow of the holder of the endowment contract, without the executors' authority.¹ Payment to the agent through whom the old payments were made, who may be authorized to receive the new premiums, would not show any intention one way or the other.² But an indorsement on the policy, announcing that the transferee shall be liable on payment of the premiums, was held, on payment, to constitute a novation.³ And where on receipt of the amalgamation circular, the policyholder had his policy indorsed by the new company, accepting the liability to pay thereon, and pays the premiums to it, was held a novation.⁴

404. A receipt coupled with payment of a premium to the new insurer is stronger evidence, but not necessarily conclusive of a novation. As where the policyholder has got no information beyond the receipt, which does not clearly disclose the nature of the transaction.⁵ Or where he simply pays to and takes receipts from the transferee, not knowing expressly or impliedly the effect of what he does ;⁶ or did not get a circular, paid through the same agent, did not read the receipts, and denied all knowledge of the matter.⁷ But where, in addition to the payment of premiums and acceptance of a bonus, receipts are also taken from the transferee, and there has been a notice of the change, novation has been established.⁸ In the *Whitehaven Bank Case*,⁹ where a policyholder was sent a circular, explaining the amalgamation and offering a substitution of contract, which was not repudiated, but premiums were paid and receipts taken from the transferees, a novation was established. Under similar facts a novation was established, though the policyholder had successfully insisted on being allowed days of grace by

¹ *Dupre's Case*, Reilly Alb. Arb. 236.

⁶ *Blundell's Case*, Reilly Eur. Arb.

² See *Conquest's Case*, 1 Ch. D. 334; 84; *Conquest's Case*, 1 Ch. D. 334.
⁷ *Clegg's Case*, Reilly Alb. Arb. 266.

³ *Miller's Case*, 3 Ch. D. 391.

⁸ *Re Anchor Assur. Co.*, 5 Ch. Ap.

⁴ *Blood's Case*, 9 Eq. Cas. 316.

632; *Knox's Case*, Reilly Alb. Arb. 132.

⁵ *Re Manchester & Lond. L. Assur.*,
Etc., Assn., 5 Ch. Ap. 640.

⁹ Reilly Alb. Arb. 62. See *Cocker's Case*, 3 Ch. D. 1.

the transferee, like those of the transferrer, being greater in number than permitted by the transferee company.¹

405. One of the strongest proofs against the establishment of a novation is a protest against it. By protest is meant, not a mere objection made when the protester acts, nor such an objection as the protester thinks is a legal protest, but such as will reasonably raise in the mind of the other party the idea of an objection to the company's action and an intention to resist it, and not be bound by it. Thus in *Howell's Case*,² under facts similar to those in the *Whitehaven Bank Case* just referred to, there was held to be a novation, though an endeavor was made to be shown a protest, by the fact that when the policyholder went to the office of the transferee company he objected to the amalgamation, it was stated to him by the officers of the transferee company that he had no alternative but to pay his premiums to that company, unless he chose to let his policy lapse, as by this statement his conduct was in effect determined, although he might have continued to be dissatisfied with the transaction. And in *Rivaz's Case*,³ a novation was also established on facts similar to those in the *Whitehaven Bank Case*, though objections to the amalgamation were made by the policyholder in conversation with an agent of his assurance company.

406. Action on the part of the insured, in consequence of a communication from the transferee in the matter of documents, is strong evidence of a novation. Thus, a novation was established against the holder of an endowment contract where, in consequence of the receipt of a circular holding out the advantages of the novation, he brought his contract to the transferee company, and had it indorsed by them with a certificate of their liability to pay the sum assumed by the contract.⁴

407. The receipt of an instalment of an annuity or bonus from the transferee is not always conclusive of a novation. Thus, a novation was held not established where the grantee of the annuity was paid under the old grant form.⁵ Neither was one established where the annuity was paid by the transferee, but there was a refusal to give an assent to a transfer which was necessary to a wind-

¹ *Warne's Case*, Reilly Alb. Arb. 113.

² Reilly Alb. Arb. 116.

³ *Ib.* 104.

⁴ *Hawtrey's Case*, *Ib.* 138. See *Dale's Case*, *Ib.* 11.

⁵ *Re Family Endowment Soc.*, 5 Ch. Ap. 118.

ing up, as the payment by the transferee might be looked upon as merely through an agency of the transferrer.¹ But a novation was held established where, in consequence of a circular as to the novation, the policyholder brought his contract to the transferee, had it endorsed by them with a certificate of their liability for the sum insured, and received payments on it.² And it was also established where there are receipts, and a circular sent, the effect of which, if not answered, will be that a bonus will be paid, or added to the policyholder's credit, and no answer is, in fact, made.³ And where the insured had kept on foot his old policy, but, on getting a circular as to bonuses, elected to take the bonus in form of a reduced premium, it was held a novation.⁴

408. It may be added that where the old policy is lapsed, but the insured is urged by the agents of the transferee to take a similar one in that company, in consequence of which he agrees to exchange the old policy for a similar one to be issued in a reasonable time, and gives a premium note, this would not be a novation, but an original contract with a fresh and sufficient consideration.⁵

409. Novation is a question of intention, but it is not incumbent on a policyholder to show that he did not intend to adopt the liability of a new company, but the company alleging the substitution must prove an agreement by the policyholder to do so by written declaration or acts unequivocally.⁶

410. It is important for a shareholder in the transfer company to ascertain clearly his position on a transfer or amalgamation. Thus he should find out whether his original liability continues, whether he assumes a fresh liability, whether he is entitled to be paid any money or receive new shares by the terms of the amalgamation, whether it is authorized or *ultra vires*, whether it is necessary for him to take any action in the matter by way of procuring an advantage that may be offered to him by the company's action, or by way of a protest or invoking the aid of a Court to save himself from

¹ *Re India & Lond. L. Assur. Co.*, 7 Ch. Ap. 651. See also *Coghlan's Case*, Reilly Eur. Arb. 46.

² *Dale's Case*, Reilly Alb. Arb. 11.

³ *Allen's Case*, Reilly Alb. Arb. 127; *Glazebrook's Case*, Ib. 135; *Wernnick's Case*, Ib. 101. See *Holmes's Case*, Ib. 110.

⁴ *Spencer's Case*, 6 Ch. Ap. 362. See also *Nunneley's Case*, 39 L. J. Ch. 297.

⁵ *Shaw v. Republic L. Ins. Co.*, 67 Barb. (N. Y.) 586.

⁶ *Coghlan's Case*, Reilly Eur. Arb. 46; *Blundell's Case*, Ib. 84.

incurring possible damage. The ascertainment of these matters involves the questions as to whether the transfer is *ultra* or *infra vires*, whether his assent is needed, whether the conditions imposed by law on the transfer are performed, and in certain cases whether the creditors acquiesce in it.¹

411. The duties imposed on the transferring company by the amalgamation must be strictly performed.² It has been held that the creditor's mere knowledge of the deed of settlement of the transferrer which empowered an amalgamation is not notice of the details of an arrangement which might possibly come within that power, for the creditor would have no means of finding out what might be done in the matter.³

412. The question as to whether the shareholder of the transferrer has been in fact properly constituted a shareholder of the transferee often arises. To be a shareholder of the transferee mere negotiations are not sufficient, but there must be a clear contract. Thus, where a holder of half-paid-up shares in the selling company applied, according to the terms of the amalgamation, for half-paid-up shares in the buying company, and received answer that shares had been allotted to him, but credited with the proportionate part of the net assets of selling company, and he never received the certificates, though he applied for them; on the amalgamation subsequently being declared void, it was held, as the answer to his letter of application contained fresh terms, that the contract was not completed, and his application for certificates was not an acceptance of the fresh terms.⁴ But if a shareholder has in fact taken the allotted shares, he cannot afterwards repudiate them on the ground the allotment was not in accordance with his application.⁵ But where a shareholder has taken proceedings for a transfer of his shares, but the same has not been legally completed before the commencement of the winding-up, and there has been no wilful delay attributable to the directors in respect of the completion of the transfer, it has been held there is no novation.⁶

413. Where a deceased shareholder had, in contemplation of an

¹ See Lord Westbury's remarks in *Lancey's Case*, Reilly Eur. Arb. 13.

² See *Ex parte Brit. Nation L. Assur. Ass'n*, 8 Ch. D. 679; *Re Merch. & Tradesman's Assur. Soc.*, 9 Eq. Cas. 694; *Pownall's Case*, Reilly Eur. Arb.

8; *Lancey's Case*, *ib.* 13; *Lee's Case*, Reilly Alb. Arb. 1.

³ *Pownall's Case*, *supra*.

⁴ *Beek's Case*, 9 Ch. Ap. 392.

⁵ *Wynne's Case*, 28 L. T. N. S. 805.

⁶ *Read's Case*, Reilly Eur. Arb. 19.

amalgamation, sold his shares in the transferrer to the transferee, but no alteration had been made in the transferrer register, it was held his executors must be put on the list of contributories of the transferrer, whatever may have been the neglect on the part of the executive of the transferrer to alter the name,¹ though he might have a remedy over.² And where a shareholder has accepted shares in the company transferee, instead of his old ones, he would be liable if his name remain on the register.³

414. It would appear that no matter in what capacity a name gets on the register, if it is regularly entered, the name is bound. Thus, where shares have been transferred to the secretary of the Albert, as trustee, as an accommodation till they could be transferred to others, and the party on the register had no beneficial interest in the shares, he must be put on the list of contributories, within clause 103 of the English Act, and it seemed not material whether the trust character appeared on the register or not.⁴ And where the directors, having improperly given shares to the managing director, who induced his brother to execute the deed in his name for a part of the shares, and the directors subsequently recalled these shares, it was held the brother was a contributory; for by the deed he covenanted with all the others besides the directors, and had agreed to contribute for the shares, and that while a shareholder he could do duty as such.⁵ But the executors of a man who in 1846 applied for and paid the deposit on shares and was registered, but never signed the deed of settlement, were held not liable to contribute in 1872.⁶

415. But where shares of the transferee stood in the joint names of two persons without beneficial ownership, and one was dead, his executors were put on the list jointly with the surviving holder, but only as to liabilities up to the time of the testator's death; for they were not tenants in common, but joint tenants, and the doctrine of survivorship applied.⁷

416. The liability of the transferee to the transferrer depends, when *infra vires*, on the terms of the amalgamation or transfer agreement. Where the B. company agreed with the A. company,

¹ Nichols's Case, Reilly Alb. Arb. 40.

² Lee's Case, Ib. 1.

³ Pownall's Case, Reilly Eur. Arb. 8.

⁴ Easum's Case, Reilly Alb. Arb. 170.

⁵ Holt's Case, 15 Jur. 369. See also Part's Case, 10 Eq. Cas. 622.

⁶ McKenzie's Case, 18 Solic. J. 223.

⁷ Kirby's Case, Reilly, Alb. Arb. 67.

which was a Pennsylvania concern, with agencies in New England and New York, to pay all losses on all policies issued by it on risks in the State of New York and not elsewhere, the B. Co. to insure by a schedule to be prepared by A., and several policies, subject to the terms of the agreement on the schedule, were on the property of New Yorkers, situate elsewhere, it was held the contract of reinsurance did not include such risks.¹ An agreement by the A. company to reinsure all the risks of the B. company in certain places, was held not violated by the latter sending, after part performance, to the former insurance which they ought not to have had, and the withholding others which under the contract they should have had.² Where an insurer, after reinsuring a risk, assigned all its business, good-will, etc., to a third company, which agreed to reinsure all the insurer's risks, it was held on payment by the transferee the reinsurer must reimburse the former, for there was nothing in the point as to double indemnity.³ Where the reinsurer, *inter alia*, agreed to issue its stock in exchange for the stock of the reinsured, to all as should apply therefor in a specified time, then to pay for its own stock so issued the par value if demanded within a certain time, and the other company transferred its assets, out of which such shareholders as chose to avail themselves of its assets were paid; in an action by the receiver of the transferrer, it was held that no action lay against one of these shareholders to recover back the money so paid, for there was no privity, and the representative of the reinsurer, if any one, should see the assets of the latter company were not misapplied; until the novation should be set aside the reinsured would be liable to the creditors of both companies; and if a deficiency and a wrongful payment to shareholders by the reinsurer took place the receiver of the latter should interfere.⁴ On an agreement, in 1865, by the A. Co. to assume the B. Co.'s liabilities, in consideration of which the B. Co. was to transfer its assets and property to the A. Co., among which were a lease in the name of a trustee for the B. Co., mortgages to trustees to secure the B. Co. its advances to the mortgagees, reinsurance policies effected by the B. Co. with other companies, all of which were handed over, though the lease and mortgages were not assigned to the

¹ Lond. & Lancash. F. Ins. Co. v. Lycom. F. Ins. Co., 105 Pa. St. 424. ² F. Ins. Ass'n v. Can. F. & M. Ins. Co., 2 Ont. R. 481.

³ Fame Ins. Co.'s Ap., 83 Pa. St. 396. ⁴ Bent v. Hart, 73 Mo. 641.

company, several of the B. Co.'s policyholders did not accept the A. Co. as their debtor. On a winding-up, in 1869, of the A. Co. and the B. Co., it was held the liquidator of the B. Co. was not entitled, on the principle of a lien for unpaid purchase-money, to have delivered back the lease, mortgages, and reinsurance policies, nor, as a surety who discharges a debt, to the reinsurance policies.¹ Where the transferee agrees to indemnify the transferer, *qua* company, against all the latter's liabilities, a judgment recovered against the latter, though not paid, is sufficient to make the former liable.²

417. Whether the policyholders of the transferer have an action against the transferee on a loss is dependent upon whether the transfer agreement is that the transferee shall indemnify the transferer, *qua* company, or the policyholders of the latter. But if the agreement is simply to indemnify the transferer, *qua* company, and the transferee recognizes and makes payments to annuity holders in the transferer, they become direct creditors of the former.³ In Wisconsin, the agreement that "all losses arising under the policies of" the transferer should "be borne by the transferee, and should be paid, satisfied, and discharged by it . . . and the loss of the transferer arising thereunder should be borne, paid, satisfied, and discharged" by the transferee, who should thereupon become "owner of the good-will, original documents," etc., of the transferer, was held to authorize a suit by a policyholder of the transferer against the transferee directly.⁴ And an agreement by the reinsurer to pay the reinsured's policyholders "all such sums" as the reinsured "may be by force of such policies become liable to pay," and the reinsured had thereafter declined to accept the premiums due on the plaintiff's policy, it was held the transferee was liable, on the agreement to a policyholder in action for failure in the reinsured to keep up his policy.⁵ And in *Glen v. Hope Mut. L. Ins. Co.*,⁶ where the A. Co., which had issued three policies payable to the plaintiff, two of which it had reinsured, agreed with the B. Co. that the latter should reinsure all outstanding risks, it was

¹ *Ex parte* West. L. Assur. Soc., 11 Eq. Cas. 164.

² *Ex parte* Anglo-Austral. Ass'n, 12 W. R. 701.

³ *Ib.*

⁴ *Johannes v. Phoenix Ins. Co.*, 66 Wis. 50.

⁵ *Fischer v. Hope Mut. L. Ins. Co.*, 69 N. Y. 161.

⁶ 56 N. Y. 379.

held the plaintiff could recover on the three policies against B. Co., though it had already paid the amounts on two to the A. Co.

418. In *Fleming's Case*,¹ the A. Co. and C. Co. were amalgamated with the B. Co., and a deed of settlement was executed, by which B. was constituted as a common law partnership, which recited that the two companies had transferred all their risks to B., which undertook to indemnify them against liabilities, X., a policyholder in A. and a shareholder in C., executed the B.'s deed and took shares in B. in exchange for his others. On a winding up of B, X. proved against A., and it was held by James and Mellish, L. JJ., that as X. had executed B.'s deed of settlement and accepted his liability he could not claim as creditor as against A.; for a creditor of a joint stock company, which, on becoming a new partnership, had taken all the assets of the old partnership, and given an undertaking to discharge all the debts of that company, including his own, cannot recover an old debt, for as between that creditor, now a shareholder of the new concern, and the old company, it has ceased to exist. But in *Frere's Case*,² Lord Cairns declined to follow *Fleming's Case*, and, on an amalgamation of two insurance companies, where the transferee covenanted to indemnify the transferrer against all contracts, and some holders of contracts of the transferrer, who were also shareholders in that company on the amalgamation, had taken by way of exchange for those shares an equivalent number of shares in the transferee, his lordship held that they were not thereby precluded from claiming against the transferrer on the contracts, saying: "These covenants to indemnify are not covenants unlimited in their scope, but they do nothing more than bind and affect the paid and unpaid capital of the indemnifying company. Therefore a shareholder in the indemnifying company is not a person who has covenanted to indemnify, without limit of liability in respect of the debts of the old company, he is a person who has done nothing more than this; he has agreed that the paid and unpaid capital of his own company, including the unpaid portion of his own share capital, shall be available to indemnify the old company in respect of the old debts. That seems to me not to be a merger or an extinguishment of his own claim against the old company supposing that otherwise his debt against the old company would subsist. It

¹ 6 Ch. Ap. 393.

² Reilly, Alb. Arb. 211. See also Indemnity Case, Ib. 17.

is only a dedication, as it were, of his own portion of the capital, which must be paid up to indemnify the old company. It is not an extinguishment of the debt."

419. The fact that a policyholder in the transfer, before suing the transferee, had sought without success to have the transfer set aside, in which proceedings a decree was had in the transferee's favor, will not preclude him from subsequently bringing an action on his policy against the transferee.¹ Where an amalgamation between A. and B. was subsequently avoided, but B.'s deed empowered the directors to draw and accept bills for the purposes of the company, and before the so-called amalgamation a policyholder in A. sustaining a loss, in satisfaction of which B.'s directors had given him a bill drawn on their cashier, it was held that B. was not liable on the bill, as it was not drawn for the purposes of the Company, and the policyholder could not set up ignorance of power, for he was bound to take notice of the deed of settlement, and therefore was cognizant of the want of authority in the directors to draw the bill.²

420. Under certain conditions, however, illegal transfers have not only been upheld; and where a company had illegally transferred all its business and property to another on condition of the transferrer's shareholders being indemnified, it was held, on a bill for specific performance of the agreement by the transferrer that such indemnity should be decreed, on the principle that as the transferee had had the benefit of the agreement, it could not object, that the agreement was *ultra vires*.³ On an *infra vires* amalgamation, under a deed of settlement which provided that the funds and property should alone be liable for claims, but which enabled the proprietors to dissolve and thereupon obtain from some other company an undertaking to pay the claims of the transferrer and to transfer to such transferee sufficient assets to meet such claims, it was held there was no obligation on the transferrer to see that the assets transferred to the transferee were appropriated for the payment of the claims on the transferrer.⁴

421. In the United States, as has been stated,⁵ the laws of each

¹ *Fischer v. Hope Mut. L. Ins. Co.*, 69 N. Y. 161.

² *Balfour v. Ernest*, 5 C. B. N. S. 601.

³ *Anglo-Austral. L. Assur. Co. v. Brit. Prov. L. & F. Soc.*, 3 Giff. 521.

⁴ *Cocker's Case*, 3 Ch. D. 1.

⁵ *Ante*, §§ 66-68.

State usually provide for the deposit of securities by a company for the security of its policyholders, and as these securities are deposited as a special trust-fund for the policyholders of that particular company, a transfer of all the assets of the transferrer would not necessarily pass this fund, as to dissentients discharged of the trust, so that the reinsurer might apply it to the payment of its general creditors.¹ Nor, where the transferee had agreed to assume all the transferrer's risks, does the fact that certain of the latter's policyholders surrendered¹ their policies to the former, taking its policies in exchange, constitute the transferee a policyholder in the transferrer, nor to share in the deposit fund.² Where the reinsurer has been improperly allowed to withdraw such deposit and replace it with its own secured notes, these become affected with the lien of the original trust.³ Nor could the doctrine of *ultra vires* be invoked to deprive the policyholders of their lien.⁴ The agreement of the reinsurer to pay the policies of the reinsured would not create as against dissentient policyholders an equitable claim by the former on the fund.⁵

422. Securities, forming part of the assets of a company about to close up its business and reinsure, which are assigned to protect the sureties on an indemnity bond, given by the reinsured to the reinsurer, on the condition that after the surety's liability is at an end the securities shall be apportioned among the reinsured's shareholders, become on such apportionment the property of the shareholders.⁶ But the shareholders take title, subject to the rights of the company's creditors, who have an equitable lien on the securities, as the shareholders of the reinsured must answer to their creditors on the failure of the reinsurer to do so.⁷ An agreement was made by a company, about to wind up and reinsure outstanding policies, to return to its shareholders or their assigns the notes and mortgages given by them to secure stock issued to them by the transferrer, on or as soon as practicable after execution of the contract. It was held the transferrer may retain the securities, until

¹ *Relfe v. Columbia L. Ins. Co.*, 10 Mo. Ap. 150; *People v. Empire Mut. L. Ins. Co.*, 92 N. Y. 105.

² *Reese v. Smyth*, 95 N. Y. 645.

³ *Relfe v. Columbia L. Ins. Co.*, 10 Mo. Ap. 150.

⁴ *Ib.*

⁵ *Ib.*

⁶ *Heman v. Britton*, 88 Mo. 549.

⁷ *Ib.*

all its debts and all equities between it and its shareholders adjusted, and may assess the shares of stock to pay outstanding debts, and dispose of these securities to shareholders, who pay assessments on the stock, which the securities were given to secure.¹ The security of this trust fund is not confined to such policyholders as have obtained judgment against the company before the appointment of a receiver.² But where on an amalgamation a fund was vested in trustees to pay all the immediate claims of the transferrer at the date of the declaration of trust unpaid and unsatisfied, it was held, one entitled to receive an annuity at the time of the amalgamation from the transferrer could not be paid the capital value of the annuity, for it could not be termed an immediate claim within the trust, though an instalment, if any had been then due, could have been demanded.³ Where on a mutual company's reinsurance there was in the treasury a large sum, which was the proceeds of payments in excess of the demands upon the company by past and present policyholders, and interest on investments which had been of about the same amount for some years, it was held, on a suit by a member on a proposed distribution, that the sum should be distributed among the past and present policyholders, who had contributed to such surplus whether at present members or not.⁴ In *Mason v. Cronk*,⁵ there was a guarantee by certain people of the fulfilment of the agreement of transfer, and it was held that the transferee company on an amalgamation or transfer does not guarantee the solvency of the transferrer, but still the reserve fund of the latter should be kept intact, and an intentional diminishing of it unlawfully would make the guarantors liable. In *ex parte Scottish Economic L. Assur. Co.*,⁶ the company was required by the Act of 1870 to deposit £20,000, to be held by the public officers, till the company's life insurance fund should accumulate out of premiums to the amount of £40,000; and it was held that the fund could not be paid out till this should be done; although the transferee had done an immense business and had large accumulations.

423. When policies are transferred *en bloc* it is submitted, unless

¹ *Markson v. Buchan*, 33 Kan. 739.

⁴ *Smith v. Hunterdon Co. Mut. F.*

² See *Relfe v. Columbia L. Ins. Co.*, 10 Mo. Ap. 150; *People v. Empire Mut. L. Ins. Co.*, 92 N. Y. 105.

Ins. Co., 41 N. J. Eq. 473.

⁵ 125 N. Y. 496.

⁶ 45 Ch. D. 220.

³ *Wyatt's Case* Reilly Alb. Arb. 42.

an agreement appears to the contrary, that the conditions of the policy would remain unchanged. Where a transferee, who had agreed to take the transferrer's risks, issues to a policyholder of the transferrer a policy, reciting a surrender of the former policy, and making the application and representations of the former policy a part of the new contract and warranting them, it was held to relate to the date of the application of the former policy, and not to the issue of the new one.¹ Where, on a transfer, the holder of a lapsed policy in the transferrer took from the transferee a receipt for the issue of a similar policy, with interim insurance, and executed a note for a year's premium, without any proviso for forfeiture for non-payment, it was held that the failure to pay the premium did not avoid the policy, as the payment of the note was not a precedent, but an independent condition.² Where the transferee took all the risks in the same conditions it was held that the transferrer's consent to an assignment by the insured, after the transfer, without that of the transferee was sufficient; and payment by the transferrer to the insured would entitle it to a recovery against the transferee.³

¹ *Cahen v. Continen. L. Ins. Co.*, 69 N. Y. 300.

² *Faneuil Hall Ins. Co. v. Liv. & Lond. & Globe Ins. Co.*, 153 Mass. 63.

³ *Shaw v. Republic L. Ins. Co.*, 67 Barb. (N. Y.) 586.

BOOK III.

AVOIDANCE OF THE CONTRACT.

CHAPTER I.

FRAUD.

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DIVISION I.—FRAUD IN GENERAL.

424. We have discussed, in the First Book of this Treatise, the elements which must exist in a contract of insurance in order to entitle one of the parties to recover damages on its breach by the other. It is now proposed to consider the causes which after the formation of the contract, will enable either party to take steps to have it set aside before the time arrives for its final performance, as well as the defences a party may have by way of avoidance of the contract in an action upon it, as distinguished from those founded on its breach by the other party. The causes for which a contract may be avoided are Fraud, Illegality, Failure of Consideration, and Mistake.

425. When a contract of insurance is induced by the fraud of one of the parties, the other party to the contract has three courses open : one course is to go in to a Court of Equity and ask to have the contract set aside, if he can place the first party to the contract in *statu quo ante*.¹ For there is no apparent reason why a policy of insurance may not be set aside by a Court of Equity for fraud like any other contract, and Courts of Equity have frequently so decided.² And an injunction has been held to lie to restrain the

¹ See *Clarke v. Dickson*, E. B. & E. 148; *Hedden v. Griffin*, 136 Mass. 229; *Lloyd v. Un. Ins. Co.*, 2 Pug. (N. B.) 498.

² *French v. Connelly*, 2 Anstruth, 454; *Whittingham v. Thornburgh*, 2 Vern. 206; *Fenn v. Craig*, 3 Y. & Coll. 216; *Lond. Assur. Co. v. Mansel*, 11 Ch. D. 363; *Lond. & Prov. Ins. Co. v. Seymour*, L. R. 17 Eq. 85; *Me. Benef.*

Ass'n v. Parks, 81 Me. 79; *Tebbetts v. Hamilton Mut. Ins. Co.*, 3 Allen (Mass.), 569; *Hedden v. Griffin*, 136 Mass. 229; *Globe Mut. L. Ins. Co. v. Reals*, 50 How. Pr. (N. Y.) 237; *Nat. L. Assur. Co. v. Egan*, 20 U. C. Ch. 469; *Lloyd v. Union Ins. Co.*, 2 Pug. (N. B.) 498; *N. Y. L. Ins. Co. v. Parent*, 3 Q. L. R. 163.

assignment of a policy obtained by fraud.¹ Not infrequently, however, chancellors have declined to cancel a policy and restrain a suit at law commenced upon it, when they considered the facts could be more suitably tried before a jury.² Again, if the injured party cannot put the other party in *statu quo*, or if he has suffered damage, he may commence an action of deceit and recover the damage suffered by reason of the fraud.³ Or he may (as a general rule at the present time) plead such fraud as an equitable defence to an action brought by the other party on the contract.⁴

While there frequently appear in insurance contracts provisions to the effect that the contract will be avoided by a fraudulent statement, or a fraudulent concealment of a material fact, this is merely a statement of the rule of the common law upon the subject, and has no particular force, except, perhaps, to make the insured more careful in his statements.⁵ But it is presumed that the insured might lawfully stipulate that the contract shall not be set aside for fraud, as fraud only renders a contract voidable, and not void; and a proviso that no question as to the validity of a certificate of insurance shall be raised unless within two years from its date and during the life of the member, was held broad enough to include fraud.⁶

426. It is not proposed, in this Treatise, to enter into an elaborate discussion of the intricate and subtle subject of fraud, and the reader is referred to some special work upon the subject for an extended inquiry as to it. It is only intended here to describe briefly the general characteristics of fraud, and to review those cases which involve its consideration, so far as applicable to the question of insurance. Before proceeding to define fraud, that is to say, fraud on which an action for damages can be founded, it is important to be borne in mind that fraud upon which an action may be based differs very materially from a material misrepresentation, for which the equitable rule gives a right to avoid or rescind a contract capable of

¹ *Globe Mut. L. Ins. Co. v. Reals*, 50 How. Pr. (N. Y.) 237.

² *Hoare v. Bremridge*, L. R. 14 Eq. 522; *Insurance Co. v. Bailey*, 13 Wall. (U. S.) 619; *Imperial F. Ins. v. Gunning*, 81 Ill. 236; *Charleston Ins. Co. v. Potter*, 3 Des. (S. C.) 6.

³ *Clarke v. Dickson*, E. B. & E. 148; *Hedden v. Griffin*, 136 Mass. 229; *Teb-*

betts v. Hamilton Mut. Ins. Co., 3 Allen (Mass.), 569.

⁴ *Devendorf v. Beardsley*, 23 Barb. (N. Y.) 656.

⁵ See *Britton v. Royal Ins. Co.*, 4 F. & F. 905.

⁶ *Wright v. Mut. Benef. L. Ass'n*, 43 Hun (N. Y.), 61.

rescission. Where avoidance or rescission is claimed it is only necessary to prove that there was misrepresentation, and then if proved, however honestly it may have been made, and if material, a contract based upon it may be avoided. The right to avoid or rescind in this case does not in any sense depend upon the turpitude of one of the parties, but rests upon the ground that the party desiring the avoidance has made the contract through a misapprehension of the facts of the case, when he was entitled to have the real facts stated to him by the other. The question of fraud is in no sense necessarily involved, but the question is more analogous to that of mistake.¹ Under the title of Fraud it is our intention to limit the discussion to what is legally termed fraud, that is fraud which may be the ground of an action of deceit, or of any remedy based upon fraud as such, and not to include misrepresentation, which may or may not be fraudulent. The latter principle will be considered in Book III. of this Treatise, under the head of Conditions.²

427. Fraud is difficult to define, and perhaps the meaning of the word may be best got at by looking at its legal effect upon the contract, and then it may perhaps be described somewhat thus : a ground for setting aside the contract upon the discovery and in consequence of an intentional and successful artifice practised by one of the parties without the knowledge of the other, which was material to the formation of the contract and which causes damage. There was long a contention in England whether in order to constitute a fraudulent representation the fraud must be moral fraud ; in other words, whether the mind of the party must be guilty of a moral turpitude, or whether an untrue representation, made without any reasonable ground for believing it, whereby the other party is deceived, will constitute fraud, though a *mens rea* does not exist. Or, to put it differently, is what might be said as to the person deceived, objectively to be a fraud sufficient, though not necessarily involving subjectively any moral turpitude in the party causing the error ? Is the test of fraud a *mens rea*, or the fact that the party injured has been misled ? Some English Judges have asserted the latter proposition to be the correct one, and term it "legal" fraud, as contra-

¹ See remarks of Lord Bramwell in *Derry v. Peek*, 14 Ap. Cas. p. 347, and of Lord Herschell, p. 359. ² *Ibid.*, § 531, *et seq.*

distinguished from actual or moral fraud.¹ And some American authorities seem to be to the same effect.²

428. In the leading case of *Pasley v. Freeman*³ the doctrine laid down was "that if a person told that which was untrue and told it for a fraudulent purpose and with the intention to induce another to do an act, and that act was done to the prejudice of the plaintiff, then an action of fraud would lie."⁴ Then came numerous cases in the Courts of first instance.⁵ In *Taylor v. Ashton*,⁶ which was an action of deceit for fraudulent misrepresentation, that very eminent and remarkably accurate jurist, Baron Parke, remarked: "It was contended that it was not necessary moral fraud should be committed in order to render these persons liable, for if they made statements for their own benefit which were calculated to induce another to take a particular and step, if he did take that step to his prejudice in consequence of such statements, and if such statements were false, the defendants were responsible, though they had not been guilty of any moral fraud. Indeed, he (the counsel) said the finding of the jury on this issue would warrant the position he took, because the jury found the defendants not guilty, but at the same time begged to express their opinion that the defendants had been guilty of *gross negligence*; and it is insisted that even that, accompanied with a damage to the plaintiff in consequence of that gross negligence, would be sufficient to give him a right of action. From this proposition we entirely dissent, because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind unless fraudulently made." Finally, in *Evans v. Collins*,⁷ on appeal in the Exchequer

¹ See *West. Bk. of Scotland v. Adie*, L. R. 1 H. L. Sc. 145, 162; *Weir v. Bell*, 3 Exch. D. 238; *Smith v. Chadwick*, 20 Ch. D. 27, 44, 67. See also the article of Sir F. Pollock in the *Law Quarterly*, vol. 5, p. 410.

² See *Brown v. Donnell*, 49 Me. 421; *Harding v. Randall*, 15 Ib. 332; *Fisher v. Mellen*, 103 Mass. 503; *Co-op. Ass'n v. Leflore*, 53 Miss. 1; *Bennett v. Judson*, 21 N. Y. 238. *Cabot v. Christie*, 42 Vt. 121; *Crispe v. Cain*, 19 W. Va. 438; *Schwarzbach v. Oh. Val. Protec. Un.*, 25 Ib. 622; *Remarks of Story, J.*,

in *Hough v. Richardson*, 3 Story, 659 (D. Me.).

³ 3 T. R. 51.

⁴ See remarks of Parke, B., in *Taylor v. Ashton*, 11 M. & W. 401.

⁵ See *Haycraft v. Creasy*, 2 East, 92; *Foster v. Charles*, 7 Bing. 105; *Corbett v. Brown*, 8 Bing. 33; *Polhill v. Walter*, 3 B. & Ad. 114; *Crawshay v. Thompson*, 4 M. & G. 357; *Moens v. Heyworth*, 10 M. & W. 147.

⁶ 11 M. & W. 401.

⁷ 5 Q. B. 820.

Chamber, it was held that fraud must concur with the false statement to give ground for an action of deceit.

429. Apparently the first intimation of the suggestion that an untrue statement made without reasonable ground for believing it will support an action was made in *West Bank of Scotland v. Addie*.¹ The cases of *Reese Silver Mining Co. v. Smith*² and *Peek v. Gurney*³ have been sometimes cited as supporting this view, but, as pointed out by Lord Herschell in *Derry v. Peek*,⁴ they will not bear that construction on a careful examination. In *Weir v. Bell*⁵ and in a dictum in *Smith v. Chadwick*,⁶ in the Court of Appeals, however, the principle is again asserted, though in the judgment of the latter case in the House of Lords,⁷ Lord Selborne stated that proof of actual fraud was necessary, and apparently Lord Blackburn was of the same opinion. Finally, in *Derry v. Peek*⁸ it was unanimously held by the Lords, reversing the Court of Appeals and restoring the judgment of Stirling, J., in the lower Court,⁹ that to support an action of deceit there must be moral turpitude or proof of actual fraud, and the new doctrine of "legal fraud" was completely exploded. The following propositions were considered in that case as established by the authorities: "First, to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made knowingly or without belief in its truth; or, thirdly, when made recklessly, careless whether it be true or false, though the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. Substantially the same rule was laid down in Pennsylvania."¹⁰

430. Though the deceit must be actual, the motive of the fraud is not material if damage ensues as a result of the misstatement.¹¹

¹ L. R. 1 H. L. Sc. 145, 162. See *Derry v. Peek*, 14 Ap. Cas. 368.

² L. R. 4 H. L. 64.

³ L. R. 6 H. L. 377.

⁴ P. 370.

⁵ 3 Exch. D. 238.

⁶ 20 Ch. D. 27, 44, 67.

⁷ 9 Ap. Cas. 187, 190.

⁸ 14 Ap. Cas. 337.

⁹ 37 Ch. D. 541.

¹⁰ *Griswald v. Gebbie*, 126 Pa. St. 353. See also *Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 416.

¹¹ *Watson v. Poulson*, 15 Jur. 1111; *Claffin v. Commonw. Ins. Co.*, 110 U. S. 81.

Fraud may consist of the deceitful omission to state a fact, as well as the deceitful statement of a fact.¹

431. It has been sometimes asserted that a deceitful misrepresentation of a person's intention cannot constitute fraud. There is, however, no logical difference in respect of a fraudulent statement as to a past event and a deceitful statement of an intent, though there may be greater difficulty of proof in the latter case. The ground of an action of deceit is that an untruthful fact has been knowingly stated, the right to rely, and reliance on that untruth by the other side in ignorance of its falsity, and damage. Now moral turpitude can exist in the mind of a person, stating his intention or future belief, as well as in a statement as to a past event, and if the other grounds be present, it is submitted that an action of deceit may, logically, be for a fraudulent representation as to the future. Indeed the authority for its not lying seems rather to be found in the loose dicta of Judges, in decisions on exceptions to the general rule of fraud, rather than in cases actually deciding the point. An action for a fraudulent representation of an intent was sustained in *Gerhard v. Bates*.² In *Edgington v. Fitzmaurice*,³ where directors issued a prospectus inviting subscriptions for debentures, stating that the object of the loan was to enable them to enlarge their trade premises and purchase additional plant, whereas, in fact, the object was to enable them to meet pressing liabilities, it was held that the misstatement of the purpose to which they intended to devote the money was sufficient to found an action of deceit upon. Bowen, L. J., said on page 483: "The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact." Cotton, L. J., on page 478, said: "I agree that it was a statement of intention, but it is, nevertheless, a state-

¹ See *Hoyt v. Gilman*, 8 Mass. 336; 20 Fed. R. 596 (E. D. Wis.); *Carrigan Boggs v. America Ins. Co.*, 30 Mo. 63; *v. Mass. Benefit Ass'n*, 26 Fed. R. 230 (E. D. Pa.); *Stebbins v. Globe Ins. Co.*, 2 Hall (N. Y.) 632; *Nat. L. Ins. Co. v. Minch*, 53 Fac. Dec. 166. *Soongal v. Young*, 12 N. Y. 144; *Va. F. & M. Ins. Co. v. Kloeber*, 31 Grat. (Va.) 749; *Goucher v. Northwest Travelling Men's Ass'n*, 2 E. & B. 476. ² 2 E. & B. 476. ³ 29 Ch. D. 459.

ment of fact, and if it could not be fairly said that the objects of the issue of the debentures were those which were stated in the prospectus, the defendants were stating a fact which was not true."

432. In *Rohrschneider v. Knickerbocker L. Ins. Co.*,¹ the plaintiff was induced, by pamphlets issued by an insurance company, and given to her by its authorized agent, which represented that the premium notes given for half the premiums would never have to be paid, but that they would be cancelled by dividends, to take out an endowment policy, on which she continued to pay cash and give the annual note until its maturity. It appeared she had no means of learning the falsity of the representations, and relied on them until the policy matured, when she learned for the first time that only a trifling amount had been cancelled by dividends: Held, the company was responsible for the deceit, and that she was entitled to recover the premiums paid, with interest; and was not estopped, because she had acted on her contract till the policy's maturity. The Court said: "It cannot be doubted that this was an actionable fraud. It was not like the usual commendations of his own, which one may make with impunity when engaged in trade or traffic. It was the representation of a specific fact quite material to the transaction." In *Martin v. Ætna L. Ins. Co.*,² the general agent of a company induced the insured to take out policies on the ten-year plan, by representing that the dividends after the fourth year would cancel the notes successively, and that after two annual payments he would be entitled to a paid-up participating policy for as many tenths on terms equally favorable. On finding, after the fourth payment, that the first note had not been cancelled by dividends, paid-up policies were demanded from the agent in accordance with the understanding, but instead of participating policies, simple paid-up policies for reduced sums together with the notes were returned, which were repudiated. Held, the insured was entitled to have the contract, which had been induced by the agent's fraud, declared void and rescind. The Court said: "But it is said that this was not such misrepresentation as could have misled the complainants, and, therefore, that it was not fraudulent because the complainants must have known that it was impossible for the agent to know what future dividends would be

¹ 8 Ins. L. J. 392 (N. Y.).

² 4 Ib. 899 (Tenn.).

declared by the company. It is necessary to keep in view the relations between these parties. The agent was the agent of a foreign corporation, which he represented as having assets to the amount of \$20,000,000. He was thoroughly informed as to all the intricacies and mysteries of the life insurance business as well as with all the operations of his company. He was seeking patronage for his company, and was soliciting it from persons who were ignorant of all the workings of the life-insurance machinery. They were dependent on him for the knowledge and information on which he advised them to invest their money. What they desired was not only to make a safe but a paying investment, and their decision was to be made by confiding in his integrity and his superior knowledge. He knew what his company had been doing in the way of dividends for many years; he knew its ability and the manner of making profits. Complainants prove that he said the dividends would be, at least, fifty per cent. He says himself that he told them that 'the dividends were then fifty per cent. on the annual life plan;' but he says it was impossible for him to tell what they would be in the future, yet these credible witnesses prove that he did undertake to state, from his own knowledge of what the company had done in the past, and of its ability at that time, with confidence that its dividends in the future would be, at least, fifty per cent. This statement made to the complainants in their situation would naturally have all the force of the statement of a fact."

433. *Jorden v. Money*¹ has been mentioned as supporting the rule that to support an action of fraud the misstatement must be of an existing fact. But in that case the intention stated as to the future, though not carried out, was honestly made; and a perusal of that case will show that the judgment proceeded on the ground that the representation of intention did not amount to a contract, and there had been no representation which could create an estoppel, and the head note of the case is incorrect. It is true that some dicta of Lord Cranworth might be construed as militating against the rule that a misstatement of an intention may constitute fraud; but these dicta were not the ground of the judgment, and were probably not so intended. While Lord Brougham stated, "she did not misrepresent her intention," and Lord St. Leonards, dissenting,

¹ 5 H. L. C. 185.

repudiated altogether the idea that any difference existed between a deceitful misstatement of the past and the future.

434. It may be, that the supposed and popular idea that misstatement of an intent will not support an action of deceit, originated in another rule which is that misstatements by a vendor or purchaser as to an intention as to the price the one will take or the other give, or by way of puffing or depreciation, although deceitful are not actionable. It is, however, submitted that this latter rule, though somewhat anomalous, is not in reality an exception to the general rule as to what constitutes actionable deceit or fraud, but proceeds on the ground that one of the essential elements of fraud is absent in such cases, namely, materiality. For in sales, lying is so common that no reasonable man would rely upon what the seller affirms. In other words, there can be no fraud where no reasonable person can be deceived. As Lord Ellenborough said, "the purchaser is at liberty to do that as a purchaser, which every seller in this town does every day, who tells every falsehood he can to induce a buyer to purchase."¹ Or as Gray, J., put it in *Manning v. Albee*,² these misrepresentations "are assumed to be so commonly made by those holding property for sale in order to enhance its price, that any purchaser who confides in them is considered as too careless of his own interests to be entitled to relief, even if the statements are false and intended to deceive." A statement of an opinion is usually not material and not actionable, but a statement of an opinion not honestly entertained, and intended to be and in fact acted on, would seem logically to be a fraud,³ though what opinion a party really entertained would be difficult of proof.

435. Where there is more than one conversation, and the fraudulent statement is contained in the prior talk, but not in the latter, in order to hold the maker of the statement liable, it must be shown that the representation was continuous, and that is a question for the jury. Thus, on an indictment for obtaining money under false pretences, it appeared that A. to induce B. to join a society, said it was strong, respectable, and had \$7000 in bank, but B. declined to join. A month later A. again made a statement to the same effect,

¹ *Vernon v. Keys*, 12 East, p. 493.

² 11 Allen (Mass.), 522.

³ See *Anderson v. Pacif. F. & M. Ins.*

Willes, J.; though see the judgment of Lord Cairns in *Peek v. Gurney*, 6 H. L.

404.

Co., L. R. 7 C. P. p. 69, remarks of

but made no mention about the \$7000 in bank, and B. joined the society. The statement as to the \$7000 was untrue; and it was held it was for the jury to say whether the two conversations were so joined as to create one continuous representation.¹

436. The artifice to constitute fraud must be material; that is to say, there must be some act or statement a reasonable person would naturally rely upon, and which is influential on his mind in insuring.² The artifice must also cause damage.³ Fraud as to one part of a contract of insurance would probably vitiate the whole, even if the contract is made up of independent agreements or conditions.⁴ And where there is a policy for one premium on several items of property valued separately, fraud as to one has been held to vitiate the whole contract.⁵

437. The party injured by the fraud must proceed with reasonable promptness if he desire to repudiate the fraudulent transaction, for the Court will not assist him after an unreasonable delay from a discovery of the fraud.⁶ Having stated the general principles of

¹ *Regina v. Welman*, 17 Jur. 421.

² *Pasley v. Freeman*, 3 T. R. 51;

³ See *Pawson v. Watson*, 2 Cowp. 785-788; *Pasley v. Freeman*, 3 T. R. 51; *Britton v. Royal Ins. Co.*, 4 F. & F. 905; *Greenwell v. Nicholson*, 1 Jur. 285; *Spratt v. Ross*, 11 C. S. C. (1st ser.) 1145; *Germania F. Ins. Co. v. Deckard*, 3 Ind. Ap. 361; *Robinson v. Phoenix Ins. Co.*, 25 Iowa, 430; *Security Ins. Co. v. Fay*, 22 Mich. 467; *Vivar v. Knights of Pythias*, 52 N. J. L. 455; *Valton v. Nat. Fund L. Assur. Co.*, 20 N. Y. 32; *Smith v. Ætna L. Ins. Co.*, 49 N. Y. 211; *Clary v. Protec. Ins. Co.*, Wr. (Oh.) 227; *Phoenix Ins. Co. v. Munday*, 5 Cold. (Tenn.) 547; *State Ins. Co. v. Hughes*, 10 Lea (Tenn.), 461; *Schwarzbach v. Oh. Val. Protec. Un.*, 14 Ins. L. J. 518 (W. Va.); *Knox v. Lycom. F. Ins. Co.*, 50 Wis. 671; *Clason v. Smith*, 3 Wash. 156 (D. Pa.); *Ins. Co. v. Mahone*, 21 Wall. 152; *Jeffries v. L. Ins. Co.*, 22 Ib. 47; *McFaul v. Montreal Inland Ins. Co.*, 2 U. C. Q. B. 59.

Britton v. Supreme Council, 46 N. J. Eq. 102.

⁴ *Schuster v. Dutchess Co. Ins. Co.*, 102 N. Y. 260.

⁵ *Moore v. Va. F. & M. Ins. Co.*, 28 Grat. (Va.) 508; *Moore v. Fireman's Fund Ins. Co.*, 28 Ib. 524; *Oshkosh Packing, Etc., Co. v. Mercan. Ins. Co.*, 31 Fed. R. 200 (E. D. Wis.); *Date v. Gore Dist. Mut. F. Ins. Co.*, 14 U. C. C. P. 548; *Cashman v. Lond. & Liv. F. Ins. Co.*, 5 Allen (N. B.), 246.

⁶ See *Deposit & General Life Assur. Co. v. Ayscough*, 6 R. & B. 761; *Partridge v. Albert L. Assur. Co.*, 16 Solic. J. 199; *MacIntyre v. Cotton States L. Ins. Co.*, 82 Ga. 478; *Upton v. Jackson*, 4 Ins. L. J. 189 (Mich.); *Harris v. Equit. L. Assur. Soc. of U. S.*, 64 N. Y. 196; *Johnson v. Dakota F. & M. Ins. Co.*, 45 N. W. 799 (N. Dak.); *Upton v. Englehart*, 3 Ins. L. L. J. 743 (D. of Iowa).

fraud as applicable to the contract of insurance, we shall consider in detail the question of Fraud in respect of the Insurer, the Insured, and Third Parties.

DIVISION II.—FRAUD BY THE INSURED ON THE INSURER.

438. Where such a clause occurs in the policy as that fraud or false swearing on the part of the insured will avoid it, it has generally been held that the false swearing to come within the clause must be intentional.¹ And the Canada statutes as to such a clause have been apparently similarly interpreted.² The phrase of avoidance for “palpably fraudulent or untrue allegations” on the part of the insured has been considered to mean something more than merely untrue statements.³ The clauses against fraud or false swearing are very frequently so inserted in the policy, that the Courts have construed them as referring to fraud or false swearing in the proofs of loss only.⁴

439. An overvaluation of the subject-matter on the part of the insured at the inception of the contract if fraudulently made is ground of avoidance,⁵ but an innocent overvaluation has been held immaterial.⁶ And it has been thought that a condition of avoidance

¹ *Gerhauser v. North. Brit. & Mercant. Ins. Co.*, 7 Nev. 174; *Lion F. Ins. Co. v. Starr*, 71 Tex. 733; *Cann v. Imperial F. Ins. Co.*, 1 R. & S. (N. S.) 240. See *Va. F. & M. Ins. Co. v. Vaughan*, 88 Va. 832.

² *Goring v. Lond. Mut. Ins. Co.*, 10 Ont. R. 373.

³ *Guinane v. Hope Mut. L., Etc., Soc.*, 7 Ir. Jur. Q. B. 52.

⁴ See *Ferriss v. N. Amer. F. Ins. Co.*, 1 Hill (N. Y.), 71; *Moore v. Va. F. & M. Ins. Co.*, 28 Grat. (Va.) 508; *Insurance Co. v. Weides*, 14 Wall. 375; *Crowley v. Agric. Mut. Assur. Ass'n*, 21 U. C. C. P. 567.

⁵ *Haigh v. De la Cour*, 3 Camp. 319; *Lycorning F. Ins. Co. v. Ruben*, 8 Chic. L. N. 150 (Ill.); *Behrens v. Germania F. Ins. Co.*, 64 Iowa, 19; *Protection Ins. Co. v. Hall*, 15 B. Mon. (Ky.) 411;

Phoenix Ins. Co. v. McLoon, 100 Mass., 475; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; *Hersey v. Merrimack Co. Mut. F. Ins. Co.*, 27 N. H. 149; *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 77; *Miller v. Germania F. Ins. Co.*, 34 Leg. Int. (Pa.) 339; *Catron v. Tenn. Ins. Co.*, 6 Humph. (Tenn.) 176; *Riach v. Niagara Dist. Mut. Ins. Co.*, 21 U. C. C. P. 464; *Newton v. Gore Dist. Mut. F. Ins. Co.*, 33 U. C. Q. B. 92; *Lingley v. North. Ins. Co.*, 3 R. & C. (N. S.) 516. See *post*, § 444.

⁶ *Cit. F. & M. Ins. Co. v. Short*, 62 Ind. 316; *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330; *Continental Ins. Co. v. Ware*, 9 Ins. L. J. 519 (Ky.); *Hickman v. Long Island Ins. Co.*, Edm. Select Cas. (N. Y.) 374; *Miller v. Alliance Ins. Co.*, 7 Fed. R. 649 (S.D.N.Y.); *Franklin F. Ins. Co. v. Vaughan*, 92

on account of overvaluation means only to apply to a fraudulent overvaluation.¹ While an excessive overvaluation is not alone conclusive as to fraud,² it may be some evidence of fraud, and if coupled with other circumstances may prove fraud.³ And, as was said in *Sturm v. Atlantic Ins. Co.*,⁴ the more excessive the valuation the greater the value of the evidence will be. To show an overvaluation of stock in trade by the insured, it has been held the insurer may produce evidence showing a comparison of the insured stock with other similar stocks, and what one familiar with the stock knows about it, as well as the statements made by the insured at the fire.⁵ To rebut the insurer's defence of overvaluation of a picture, the Court refused to admit evidence of private offers made to the insured after the issue of the policy.⁶ The insured has been allowed to show that the insurer's agent filled in the application of the insured for insurance, and knew the value of the property.⁷ Evidence that the general agent who issued the policy has insured the same property in another company, and that a sub-agent of that other company had previously valued it, was admitted in order to show what information was before the general agent of the defendant at the time of the insurance.⁸

440. Where a contract is *bonâ fide* made, and later in the day a loss occurs before the issue of the policy, both parties being ignorant of the loss, it is valid.⁹ But if the insured knows of the loss before the contract is completed he cannot recover.¹⁰ Where the

U. S. 516; *Rice v. Provincial Ins. Co.*, 7 U. C. C. P. 548; *Dickson v. Equit. F. Assur. Co.*, 18 U. C. Q. B. 246.

¹ *Wheaton v. N. Brit. & Mercant. Ins. Co.*, 76 Cal. 415.

² *Ib.*; *Behrens v. Germania F. Ins. Co.*, 64 Iowa, 19. See remarks of the Court in *Catron v. Tenn. Ins. Co.*, 6 Humph. (Tenn.) 176.

³ *Ins. Co. of N. A. v. McDowell*, 50 Ill. 120; *Protec'n Ins. Co. v. Hall*, 15 B. Mon. (Ky.) 411; *Robinson v. Mfrs. Ins. Co.*, 1 Met. (Mass.) 143; *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 77; *Lynchburg F. Ins. Co. v. West*, 76 Va. 575; *Alsop v. Commere. Ins. Co.*, 1 Sum. 451 (D. Mass.); *McCuaig*

v. Unity F. Ins. Ass'n, 9 U. C. C. P. 85. See *O'Brien v. Home Ins. Co.*, 79 Wis. 399.

⁴ 63 N. Y. 77.

⁵ *Livingston v. Home Mut. F. Ins. Co.*, 50 Mich. 207. See *Gere v. Council Bluffs Ins. Co.*, 67 Iowa, 272.

⁶ *Wood v. Firemen's F. Ins. Co.*, 126 Mass. 316.

⁷ *Myers v. Council Bluffs Ins. Co.*, 72 Iowa, 176.

⁸ *Dupree v. Va. Home Ins. Co.*, 92 N. C. 417.

⁹ *City v. Peoria M. & F. Ins. Co.*, 17 Iowa, 276.

¹⁰ *Wales v. N. Y. Bowery F. Ins. Co.*, 37 Minn. 106.

insured, in reply to a question as to whether he had been previously refused insurance, said he had been, but was still corresponding with other offices as to insurance as the amount he wanted was large, it was held, where the evidence showed that he had been repeatedly declined, that his answer was such an intentional violation of the truth as to vitiate the policy.¹ A deceitful statement by the insured that he had other insurance on the same voyage at Lloyd's, has been held a fraud that vitiates the risk, though the misrepresentations did not affect the nature of the risk, on the principle that if the insured exhibited to the proposed insurer a policy underwritten by a person of skill and judgment, knowing that this would weigh with the other party, and disarm the prudence ordinarily exercised in such transactions, it would be a fraud, for though it might not affect the nature of the risk, it would induce a confidence without which the proposed insurer would not have acted.² A vendee under a contract of sale, on which he has made payments, with the equitable title, is not necessarily guilty of fraud in describing himself as the owner.³ Where the applicant of his own motion represents himself as sound in health, and afterwards, for the purpose of obtaining a surrender, declares himself to have been seriously diseased, the company has good ground for declaring the contract forfeited.⁴ But the fact of disease appearing soon after the insurance and resulting in death is not alone evidence of fraud, though taken with other evidence it may be a link in a chain.⁵ Where there was a clause that fraud or attempt at fraud or false swearing should avoid the policy, the insured's statement that an assignment with the insurer's consent, which was in reality made to defraud creditors of which the insurer was ignorant, was for the benefit of all the creditors, was held a fraudulent misrepresentation.⁶ An immaterial alteration of a policy made by the insured innocently, will not avoid.⁷ Thus, where in a ship policy to a port "during her stay," the words "and trade" were inserted by the insured

¹ *Ex parte Daintree*, 18 W. R. 396.

² *Sibbald v. Hill*, 2 Dow, 263.

³ *Acer v. Merch. Ins. Co.*, 57 Barb. (N. Y.) 68.

⁴ *Ætna L. Ins. Co. v. Paul*, 11 Ins. L. J. 314 (Ill.).

⁵ *Eclectic L. Ins. Co. v. Fahrenkrug*, 68 Ill. 463.

⁶ *Phoenix Ins. Co. v. Willis*, 70 Tex. 12.

⁷ *Robinson v. Phoenix Ins. Co.*, 25 Iowa, 430.

after the execution of the policy, some underwriters assenting and some not, as the alternative, it was held immaterial.¹

441. A policy taken out as a result of a scheme for a fraudulent purpose, as for wagering, or in order to get the policy moneys by murder, etc., cannot be recovered on.² And in such cases evidence is admissible to show that other policies on the same life had been taken previously or about the same time for a like fraudulent purpose.³ A misstatement to an adjuster that another company had paid, must be relied upon to avoid.⁴

442. A recovery cannot be had on a policy of insurance if the insured has intentionally burnt the personalty covered or been guilty of arson.⁵ But it has been held that the procurement of the insurance with an intent to destroy will not prevent the policy from attaching, and if a loss happen from another cause, without the fault of the insured, he can recover.⁶ The burning of the insured property by the insured while insane would not relieve the insurer.⁷ The arson of a third party is not material.⁸ Nor would it affect the question if the person guilty of arson happened to be the insured's agent.⁹ On a policy on the wife's sole and separate estate, arson by her husband, without her privity, will not prevent a recovery.¹⁰ And probably the felonious burning by the wife of property insured by the husband, without his privity, would not prevent a recovery.¹¹ It has been held technical arson to burn a house during the temporary absence of the occupants.¹² In Pennsylvania the malicious setting fire to a barn belonging to a dwelling-house so situated as to

¹ *Sanderson v. Symonds*, 1 Br. & B. 426.

² *Prince of Wales, Etc., Ass'n Co. v. Palmer*, 25 Beav. 605; *Alsop v. Commer. Ins. Co.*, 1 Sumn. 451 (D. Mass.); *N. Y. Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591.

³ *N. Y. Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591; *Whitmore v. Supreme Lodge*, 100 Mo. 36.

⁴ *Mullin v. Vt. Mut. F. Ins. Co.*, 58 Vt. 113.

⁵ *Britton v. Royal Ins. Co.*, 4 F. & F. 905; *Kennedy v. Home Ins. Co.*, 6 Ins. L. J. 359 (Tenn.).

⁶ *Waters v. Allen*, 5 Hill (N.Y.), 421.

⁷ *Karow v. Continen. Ins. Co.*, 57 Wis. 56.

⁸ *Westchester F. Ins. Co. v. Foster*, 90 Ill. 121; *Grant v. Elliott, Etc., Mut. F. Ins. Co.*, 76 Me. 514.

⁹ *Henderson v. West. M. & F. Ins. Co.*, 10 Rob. La. 164.

¹⁰ *Perry v. Mechan. Mut. Ins. Co.*, 11 Fed. R. 485 (D. R. I.); *Plinsky v. Germania F. & M. Ins. Co.*, 32 Ib. 47 (E. D. Mich.).

¹¹ *Midland Ins. Co. v. Smith*, 6 Q. B. D. 561.

¹² *Stupetski v. Transatlantic F. Ins. Co.*, 43 Mich. 373.

endanger the dwelling-house, is felonious arson under the 137th section of the Penal Code of 1860, though the barn was not adjoining nor a parcel of the dwelling-house, and the latter was not in fact burned.¹ A proviso in a policy on goods excluding any loss or damage occasioned by or in consequence of incendiarism was held to prevent a recovery where the loss was occasioned by a fire spreading from the adjoining premises, which had been feloniously fired.² The fact of overvaluation has been admitted to show a motive, as a link in the chain of evidence;³ and, generally speaking, proof of the surrounding circumstances is admissible.⁴

443. Where a wilful destruction of the property, or arson, is pleaded as a defence, it has been held in England, and in several of the United States, and in Canada, that as the plea imputes a crime, although the question is incidentally raised, it must be strictly proved;⁵ and this view, which would certainly seem the logical one, is supported also by Mr. Taylor in his valuable book on Evidence.⁶ On the other hand, the great preponderance of authority in the Federal and State Courts of America, favors the view that in civil cases, where the defence sets up arson, the verdict is to be determined by the weight of the evidence, without regard to the fact that a crime is charged which may be the basis of a criminal prosecution.⁷ And Dr. Wharton supports this view.⁸ In a civil case,

¹ *Hill v. Commw.*, 12 Ins. L. J. 135 (Pa.).

² *Walker v. Lond. & Provincial Ins. Co.*, 22 L. R. Ir. 572.

³ *Fariners' Mut. F. Ins. Co. v. Crampton*, 43 Mich. 421; *State v. Cohn*, 9 Nev. 179; *Dwyer v. Continen. Ins. Co.*, 63 Tex. 354; *Stitz v. State*, 4 N. East. R. 145 (Ind.).

⁴ *Johnson v. State*, 65 Ind. 204; *Fariners' Mut. F. Ins. Co. v. Crampton*, 43 Mich. 421; *People v. Hooghkerk*, 13 Ins. L. J. 749 (N. Y.); *Dwyer v. Continenl. Ins. Co.*, 63 Tex. 354; *Plinsky v. Germania F. & M. Ins. Co.*, 32 Fed. R. 47 (E. D. Mich.).

⁵ See *Thurtell v. Beaumont*, 1 Bing. 339; *Willmetts v. Harmer*, 8 C. & P.

695; *Chalmers v. Shackell*, 6 C. & P. 475; *McConnell v. Del. Mut. Safety Ins. Co.*, 18 Ill. 228; *Tucker v. Call*, 45 Ind. 31; *Coulter v. Stuart*, 2 Yerg. (Tenn.) 225; *Simons v. Ins. Co.*, 8 W. Va. 474; *Blaeser v. Milwaukee Mechan. Mut. Ins. Co.*, 37 Wis. 31; *Carlwitz v. Germania F. Ins. Co.*, 12 Ins. L. J. 127 (D. N. J.); *Richardson v. Can. West Farmers' Ins. Co.*, 17 U. C. C. P. 341.

⁶ 1 Taylor, 133-4 (8th ed.).

⁷ See *Munson v. Atwood*, 30 Conn. 102; *Continen. Ins. Co. v. Jachnichen*, 16 Ins. L. J. 491 (Ind.); *Welch v. Jungenheimer*, 56 Iowa, 11, overruling *Baxton v. Thompson*, 46 Iowa, 30; and see *Fountain v. West*, 23 Iowa, 9. See also

⁸ 2 Wharton on Evidence, sec. 1246 (3d ed.).

where the defence is arson, a previous acquittal on a criminal suit is not admissible.¹ And in such a suit evidence of the good character of the insured has been excluded.² But the insured can show that other uninsured property was destroyed.³

The subject of suicide, though, perhaps, coming naturally under the head of Fraud, will be considered hereafter under Conditions.⁴

444. An innocent over-valuation, or error in the proofs of loss on the part of the insured, will clearly not avoid the policy, whether the ordinary clause as to fraud or false swearing be present or not.⁵

Behrens v. Germania Ins. Co., 58 Iowa, 26; *Ellis v. Lindley*, 38 Iowa, 461; *Bayley v. Lond. & Lancashire Ins. Co.*, 4 Ins. L. J. 503 (La.); *Hoffman v. Western M. & F. Ins. Co.*, 1 La. An. 216; *Regnier v. La. State M. & F. Ins. Co.*, 12 La. 336; *Wightman v. Western M. & F. Ins. Co.*, 8 Rob. (La.) 442; *Farmers' Mut. F. Ins. Co. v. Gargett*, 42 Mich. 289; *Knowles v. Scribner*, 57 Me. 495; *Ellis v. Buzzell*, 60 Me. 209; but see *contra Newbit v. Statuck*, 35 Me. 315, and *Butman v. Hobbs*, 35 Ib. 227; *Schmidt v. N. Y. Un. Mut. F. Ins. Co.*, 1 Gray (Mass.), 529; *Gordon v. Parmelee*, 15 Ib. 413; *Ætna Ins. Co. v. Johnson*, 11 Bush (Ky.), 587; *Rothschild v. Amer. Cent. Ins. Co.*, 62 Mo. 356; *Folsom v. Brawn*, 5 Foster (N. H.), 114; *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697, overruling, in a very elaborate and able opinion, the same case in 38 N. J. L. 441; but see *Amer. Mut. Ins. Co. v. Anderson*, 33 N. J. L. 151. The point was lately decided in a lower Court in New York: *Johnson v. Agricult. Ins. Co.*, 25 Hun (N. Y.), 251. But see *Æby v. Rapelye*, 1 Hill (N. Y.), 9; *Woodbeck v. Keller*, 6 Cowen (N. Y.), 118; *Clark v. Dibble*, 16 Wend. (N. Y.) 601; *Hopkins v. Smith*, 3 Barb. (N. Y.) 599; *Somerset Co. Mut. F. Ins. Co. v. Usaw*, 112 Pa. St. 80; but see *Steinman v. McWilliams*, 8 Ib. 170; *Bradish v. Bliss*, 35 Vt. 326; *Wash. Un. Ins. Co. v. Wilson*, 7 Wis. 169; *Blaeser v.*

Milwaukee Mechan. Mut. Ins. Co., 37 Wis. 31; *Howell v. Hartford F. Ins. Co.*, 3 Ins. L. J. 649 (N. D. Ill.); *Mack v. Lancashire Ins. Co.*, 4 Fed. R. 59 (E. D. Mo.); *Scott v. Home Ins. Co.*, 1 Dill, 105 (D. Mo.); *Huchberger v. Merch. F. Ins. Co.*, 4 Biss. 265 (N. D. Ill.).

¹ *Sibley v. St. Paul F. & M. Ins. Co.*, 9 Biss. 31 (N. D. Ill.); *Gould v. Brit. America Assur. Co.*, 27 U. C. Q. B. 473. See *Crescent Ins. Co. v. Camp*, 64 Tex. 521.

² *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737.

³ *Menk v. Home Ins. Co.*, 76 Cal. 50.

⁴ *Infra*, § 830.

⁵ *Rockford Ins. Co. v. Nelson*, 75 Ill. 548; *Franklin Ins. Co. v. Culver*, 6 Ind. 137; *Erman v. Sun. Mut. Ins. Co.*, 35 La. An. 1095; *Moore v. Prot'n Ins. Co.*, 29 Me. 97; *Wall v. Howard Ins. Co.*, 51 Me. 32; *Planters' Mut. Ins. Co. v. Deford*, 38 Md. 382; *Towne v. Springfield F. & M. Ins. Co.*, 145 Mass. 582; *Little v. Phoenix Ins. Co.*, 123 Mass. 380; *Tubbs v. Dwelling-House Ins. Co.*, 84 Mich. 646; *Gerhauser v. North Brit., Etc., Ins. Co.*, 7 Nev. 174; *Schuster v. Dutchess Co. Ins. Co.*, 102 N. Y. 260; *Gibbs v. Cont. Ins. Co.*, 13 Hun (N. Y.), 611; *Dresser v. United Fireman's Ins. Co.*, 45 Ib. 298; *Smith v. Exchange F. Ins. Co.*, 8 J. & Sp. (N. Y.) 492; *Cochran v. Ins. Co.*, 2 Bull (Oh.), 54; *Thierolf v. Univ.*

And such a proviso as that "any attempt at fraud by false swearing or otherwise," has been held to mean an attempt at fraud that would deceive and on which the insurer relied.¹ But an intentional overvaluation or fraud in respect of the proofs will obviously come within the clause against fraud or false swearing.² While fraud in the inception of the contract of insurance will avoid it *ab initio*, it has been held that fraud in the proofs of loss will only destroy the remedy and put the plaintiff out of Court, but will not render the contract itself void,³ unless there should be a proviso in the contract that fraud in the proofs will vitiate the contract.⁴ The evidence to sustain a plea of fraud must disclose a fraudulent intent, and an exaggerated or erroneous claim.⁵ But in New Hampshire an overvaluation made through carelessness and inattention, which by due attention could not have made, though not made to defraud, is considered a ground of forfeiture under the fraud and false swearing clause.⁶

Arson is essentially a fraud, though fraud is not confined to arson. Therefore the insurer may defend on the ground of arson as well as of fraud; and if the jury only suspect the fact of arson, but are convinced of a fraudulent overvaluation, they may find for the insurer on the latter ground.⁷

Ins. Co., 110 Pa. St. 37; Phoenix Ins. Co. v. Munday, 5 Cold. (Tenn.) 547; Huchberger v. Providence Wash. Ins. Co., 5 Biss. (N. D. Ill.) 106; Mack v. Lancash. Ins. Co., 4 Fed. R. 59 (D. Mo.); Meagher v. Loud. & Lancashire Ins. Co., 7 Vict. L. R. 390; Park v. Phoenix Ins. Co., 19 U. C. Q. B. 110; Parsons v. Cit. Ins. Co., 43 U. C. Q. B. 261; Stillman v. Agricult. Ins. Co., 16 Ont. R. 145.

¹ Shaw v. Scot. Commercial Ins. Co., 1 Fed. R. 761 (D. Me.); Geib v. Internat. Ins. Co., 1 Dil. 443 (D. Minn.).

² See Levy v. Baille, 7 Bing. 349; Britton v. Royal Ins. Co., 4 F. & F. 905; Regnier v. La. State M. & F. Ins. Co., 12 La. 336; Towne v. Springfield F. & M. Ins. Co., 145 Mass. 582; Hickman v. Long Island Ins. Co., 1 Edmonds Select Cas. (N. Y.) 374; Kennedy v. Hartford F. Ins. Co., 6 Ins. L. J. 359

(Tenn.); Huchberger v. Merch. F. Ins. Co., 4 Biss. 265 (N. D. Ill.); Huchberger v. Home F. Ins. Co., 5 Ib. 106; Putnam v. Commw. Ins. Co., 4 Fed. R. 753 (N. D. N. Y.); McLead v. Cit. Ins. Co., 3 R. & C. (N. S.) 156.

³ Meagher v. Loud. & Lancash. F. Ins. Co., 7 Vict. L. R. 390. See also remarks of Cowen, J., in Ferriss v. N. Amer. F. Ins. Co., 1 Hill (N. Y.), p. 74; Notes to Britton v. Royal Ins. Co., 4 F. & F. 905. And see Phoenix Ins. Co. v. Moog, 78 Ala. 284.

⁴ Phoenix Ins. Co. v. Moog, 78 Ala. 284.

⁵ Andes Ins. Co. v. Fish, 71 Ill. 620; Putnam v. Commw. Ins. Co., 18 Blatch. 368 (N. D. N. Y.).

⁶ Leach v. Republic F. Ins. Co., 58 N. H. 245.

⁷ Britton v. Royal Ins. Co., 4 F. & F. 905, and note.

Where the clause is against any fraud or false swearing in the proofs, false statements made verbally to the adjuster could scarcely come within the clause.¹

445. It is not fraud in the insured after an assignment by him, to claim at the loss all the insurance, as he does not state it belongs to him, and he may collect for the assignee; and this, in any event, before the completion of the assignment.² The insured's statement that he owned the property under a deed, when, in fact, he had only a life estate therein, is not such false swearing as will preclude a recovery, as an annexed deed showed the true title, and the statement evidently meant to describe the title in a popular sense.³ The clause as to a fraudulent overvaluation in respect of realty in Wisconsin, has been held immaterial⁴ since the passage of the Act of 1873.⁵ The statement that there was no other insurance has been held not fraudulent when the other policy was invalid.⁶ The fact of the insurer not demanding more proof as he could have done, will not estop him from relying on the false swearing clause.⁷ The insured's refusal to allow the insurer to examine the property when the latter has an option to replace is evidence for the jury as to a fraudulent overestimate of the loss.⁸ But a plan given by the insured which is incorrect in an unimportant particular has been held immaterial.⁹ An intentional delay or withholding of proofs has been stated to constitute fraud.¹⁰

446. Where the policy is issued to several jointly, it has been held that the fraud of one of the parties would come within the clause and bar the whole claim.¹¹ Fraud of the insured, within the clause, may be that of the insured, or that of another person adopted by him,¹² and swearing to an inventory as true without scrutinizing

¹ *Mullin v. Vt. Mut. F. Ins. Co.*, 58 Vt. 113.

² *Lamb v. Council Bluffs Ins. Co.*, 70 Iowa, 238.

³ *Andes Ins. Co. v. Fish*, 71 Ill. 620.

⁴ *Bammessel v. Brewers' F. Ins. Co.*, 43 Wisc. 463; *Oshkosh Packing, Etc., Co. v. Mercant. Ins. Co.*, 31 Fed. R. 200 (E. D. Wis.).

⁵ *R. S. Wis.* 1878, s. 1943. See *post*, § 1376.

⁶ *Jersey City Ins. Co. v. Nichol*, 35 N. J. Eq. 291.

⁷ *Cashman v. Lond. & Liv. F. Ins. Co.*, 5 Allen (N. B.), 246.

⁸ *N. Y. F. Ins. Co. v. Delavan*, 8 Paige (N. Y.), 419.

⁹ *Laskey v. Merch. Mut. Ins. Co.*, Louque La. Dig. 326.

¹⁰ *Betts v. Franklin F. Ins. Co.*, Taney's Dec. 171 (D. Md.).

¹¹ *Monaghan v. Agricult. F. Ins. Co.*, 53 Mich. 238.

¹² *Lion F. Ins. Co. v. Starr*, 71 Tex. 733; *Mullin v. Vt. Mut. F. Ins. Co.*, 58 Vt. 113.

it, or having knowledge of its contents, would bring the insured within the clause as to fraud.¹ The fact that the loss exceeds the insurance will not excuse the insured's fraudulent overestimate.² Though apparently a contrary view has been taken in Nebraska.³ And the insured's fraud will still come within the clause and bar a recovery no matter what his motive in making the false statement may be,⁴ even though it may not be to injure the insurer.⁵ A discrepancy between the loss as estimated in the proofs, and as it really was, does not show fraud.⁶ But a considerable discrepancy is evidence of fraud.⁷ What the discrepancy must be it is almost impossible to state. A difference between the loss as shown on the trial and in the proofs of more than half has been held not to be presumptive evidence of fraud.⁸ While a claim for more than double the amount was held to be *prima facie* evidence of fraud.⁹ In *Levy v. Baille*,¹⁰ the proof stated the loss to be £1085, and the jury found the real value to be £500, and a new trial was granted. In *McMillan v. Gore District Mut. Ins. Co.*,¹¹ where the loss sworn to was twelve times the amount proved, the Court granted a new trial notwithstanding the usual practice in that Court as to new trials where the defence charges a criminal offence. The insurer to support his plea of fraud can show that the insured did not have at the loss the goods claimed for.¹² And where the question was the amount of merchandise in a store at the time it was burned, the

¹ *Lion F. Ins. Co. v. Starr*, 71 Tex. 733; *Muller v. Vt. Mut. F. Ins. Co.*, 58 Vt. 113.

² *Dolloff v. Phoenix Ins. Co.*, 82 Me. 286.

³ *Springfield F. & M. Ins. Co. v. Winn*, 27 Neb. 649.

⁴ *Sleeper v. N. H. F. Ins. Co.*, 56 N. H. 401.

⁵ *Claffin v. Commw. Ins. Co.*, 110 U. S. 81.

⁶ *Clark v. Phoenix Ins. Co.*, 36 Cal. 168; *Marchesseau v. Meroh. Ins. Co.*, 1 Rob. (La.) 438; *Back v. Germania Ins. Co.*, 23 La. An. 510; *Israel v. Teutonia Ins. Co.*, 28 La. An. 689; *Wolf v. Goodhue F. Ins. Co.*, 43 Barb. (N. Y.) 406; *Mack v. Lancash. Ins. Co.*, 4 Fed. R. 59 (D. Mo.).

⁷ *Hoffman v. Western M. & F. Ins. Co.*, 1 La. An. 216; *Sternfeld v. Park F. Ins. Co.*, 50 Hun (N. Y.), 262; *Mack v. Lancash. Ins. Co.*, 4 Fed. R. 59 (D. Mo.); *Oshkosh Packing, Etc., Co. v. Mercant. Ins. Co.*, 31 Fed. R. 200 (E. D. Wis.); *Thomas v. Times & Beacon F. Assur. Co.*, 3 L. Can. J. 162; *Grenier v. Monarch F. & L. Assur. Co.*, 3 Ib. 100. See also *Berwin v. People's Ins. Co.*, 12 Ins. L. J. 100 (La.).

⁸ *Unger v. People's F. Ins. Co.* 4 Daly (N. Y.), 96.

⁹ *Larocque v. Royal Ins. Co.*, 23 L. Can. J. 217.

¹⁰ 7 Bing. 349.

¹¹ 21 U. C. C. P. 123.

¹² *Brugnot v. La. State M. & F. Ins. Co.*, 12 La. 326.

insurer was permitted to ask a witness who had been in the store whether there was a greater or less quantity of goods than was contained in his own store, which was furnished with similar goods, and of which an inventory had been taken.¹ Evidence of false swearing may be shown by the production of the sworn claim of loss in another company without the production of the other policy.² Where the fraud alleged was the furnishing of the certificate of a magistrate who was not the nearest to the fire, as the policy required, the insured was permitted to show that nearest magistrates had examined the loss, believed it *bonâ fide*, but had not time to examine into the details of the loss, and that other certificates from other magistrates were gotten.³ One not called as an expert cannot state his opinion that the loss is not based on a just, fair, and honest valuation of the property, although he afterwards states the facts on which it was based.⁴ The rule as to evidence under the clause that all fraud or attempt at fraud shall avoid, has been held in Illinois, to be the preponderance only, and not the evidence that shall satisfy beyond a reasonable doubt.⁵

447. The intentional suppression of a material fact has the same effect in law as an intentional misstatement. Where one is insured at a distant place, if, before the completion of the contract, he hears of a loss, he is bound to notify the insurer by the earliest known means, though not by an extraordinary or unusual conveyance.⁶ It has been held to be no evidence of fraudulent concealment to accept a policy from a local agent on a risk refused the applicant a few weeks previously by the company, without stating that fact.⁷ Where the insured is required by a condition to state a previous insurance, the simple failure to do so has been held not to support a plea of fraud.⁸ It has been held that the Court cannot say that a brick oven is so unusual that a failure to state it is fraudulent.⁹

¹ Howard v. City F. Ins. Co., 4 Den. (N. Y.) 502.

⁶ Green v. Merch. Ins. Co., 10 Pick. (Mass.) 402.

² Hazzard v. Can. Agricultural Ins. Co., 39 U. C. Q. B. 419.

⁷ Body v. Hartford F. Ins. Co., 63 Wis. 157.

³ Petersburg Sav. & Ins. Co. v. Manhattan F. Ins. Co., 66 Ga. 446.

⁸ McDonnell v. Beacon F. & L. Assur. Co., 7 U. C. C. P. 308; Parsons v. Cit. Ins. Co., 43 U. C. Q. B. 261.

⁴ Lion F. Ins. Co. v. Starr, 71 Tex. 733.

⁹ Richards v. Wash. F. & M. Ins.

⁵ Howell v. Hart F. Ins. Co., 3 Ins. L. J. 649 (N. D. Ill.).

Co., 60 Mich. 420.

A company issued an accident policy upon the life of A., who had been its canvasser, and who had been directed by the president to be cautious, as the company did not wish to insure insane persons, etc. Some time prior to the issuing the policy A. had been sent to an insane asylum and discharged cured, and from that time forward had been sane. It was held that the failure in the canvasser to disclose upon an application for a policy the fact of his former insanity, and the statement that there were no circumstances rendering him peculiarly liable to accident, had no tendency, in view of the conversation with the president, to show a fraudulent concealment of material facts.¹ The clause that proofs shall supply full particulars of an accident, and that there should not be any material suppression of facts, is not violated by the failure to state aggravated injuries resulting from and after the accident.² If a party, knowing that his agent is about to procure insurance for himself, withholds information for the purpose of misleading the underwriter, it is a fraud, and vitiates the insurance.³

448. The fraud of the insured's agent in the procurement of the contract affects his principal. For example, where a tenant under contract to insure for his landlord, fraudulently obtained a policy at his own expense in the latter's name, which he passed to the landlord, who was innocent, it was held that as the tenant was the agent for the landlord, the latter was affected with the fraud.⁴ If the insured's agent is guilty of a fraudulent statement in the procurement of the contract a Court of Equity will not relieve the principal from the effects of the fraud.⁵ Where the insured makes an innocent misrepresentation and the agent is aware of the real facts, this could not subsequently be set up as a ground of avoidance.⁶ And, as a deceitful representation, in order to constitute fraud must be material and relied on by the other party, it has been held the insured's deceit will not constitute fraud when the insurer or agent was aware of the real facts and not, therefore,

¹ *Mallory v. Travellers' Ins. Co.*, 47 N. Y. 52.

² *Rhodes v. R'way Pass. Ins. Co.*, 5 Lans. (N. Y.) 71.

³ *McLauchan v. Universal Ins. Co.*, 1 Pet. 170.

⁴ *Millville Mut. M. & F. Ins. Co. v. Collard*, 38 N. J. L. 480.

⁵ *Oliver v. Mut. Commer. Ins. Co.*, 2 Curt. 277 (D. Mass.).

⁶ *Walsh v. Vt. Mut. Ins. Co.*, 54 Vt. 351. See *Dolan v. Ætna Ins. Co.*, 22 Hun (N. Y.), 396.

deceived.¹ Where there is a clause against fraud or false swearing it was held the fact that the insurer's agents knew the real facts would not excuse a fraudulent misstatement in the proofs.² And where the insured wilfully makes false answers to a special agent, who knows the truth of the case, if the latter does not communicate it to the company, the company will not be bound.³ And this was probably one of the grounds of the decisions in *Smith v. Ins. Co.*;⁴ and in *Amer. Ins. Co. v. Gilbert*.⁵ Where an agent connives with the insured in the fraud in making false proofs, this could scarcely be set up as implying knowledge on the part of the insurer.⁶ But the mere failure of the insurer's agent to report to the insurer the issue of a special travel permit to the insured does not show any collusion with the insured.⁷

An officer may take out a policy in his own company.⁸ And a valid application of an officer may exist though the policy that is subsequently on it may be voidable; therefore, if the contract be completed by an acceptance of the application, a voidable policy that evidences the contract is not necessarily fatal.⁹

449. The deceit of the insured must be directed against the insurer, and unless this is so, fraud on some one else cannot be set up by the insurer.¹⁰ Thus the insurer cannot impeach the mode by which the insured got possession of the subject-matter, or, in other words, set up a fraud committed on third parties.¹¹ And where a by-law of a relief association required its members, employés of a railway company, to release the latter from a claim for damages before applying for such relief, in the event of an accident in consequence of which the association was to grant relief, it was held the fact of getting, by fraudulent statements as to disease, relief

¹ *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 35; *Merch. Ins. Co. v. Dwyer*, 1 Pos. (Tex.) 441. See also *Miller v. Mut. Benef. Ins. Co.*, 31 Iowa, 216.

² *Hansen v. Amer. Ins. Co.*, 57 Iowa, 741.

³ See *Lewis v. Phoenix Mut. L. Ins. Co.*, 39 Conn. 100; *Galbraith v. Arlington Mut. L. Ins. Co.*, 12 Bush (Ky.), 29; *Centen. Mut. L. Ass'n v. Parham*, 80 Tex. 518; *Lee v. Guardian L. Ins. Co.*, 5 Big. L. & A. Cas. 18 (D. Cal.).

⁴ 24 Pa. St. 320.

⁵ 27 Mich. 429.

⁶ *Hanover F. Ins. Co. v. Mannasson*, 29 Mich. 316.

⁷ *Germania F. Ins. Co. v. McKee*, 94 Ill. 494.

⁸ *Pratt v. Dwelling-House Mut. F. Ins. Co.*, 130 N. Y. 206.

⁹ *Ib.* See *ante*, § 113.

¹⁰ *Clark v. Western Assur. Co.*, 25 U. C. Q. B. 209.

¹¹ *Phoenix Ins. Co. v. Mitchell*, 67 Ill. 43; *McLean v. Hess*, 106 Ind. 555.

from the association would not prevent the insured from recovering damages against the railway company for the accident which did the injury to the insured, although the railway company guaranteed the association's contracts.¹

The fraud of the insured would obviously affect a third party who was a payee under the policy.²

450. Where the insurer has paid the amount at the time of the loss, but subsequently discovers the insured has been guilty of fraud in obtaining the policy-money, the insurer can recover it back.³ Thus it has been held that money paid in ignorance of a fraud in obtaining the policy may be recovered back.⁴ And on discovery of arson after payment the insurer can recover back the money obtained fraudulently by the insured.⁵ So also where the contract entered into is illegal because made by a foreign company which had not complied with the State laws, and it has been induced by fraud to pay on a loss.⁶ Where there has been collusion between the insured and the company's agent the company may recover back the policy-money paid by it.⁷ But in such a suit the insurers can only raise the deceit they relied upon, and which they were entitled to raise when they paid the loss, and all questions of law or fact as to the validity of the contract of insurance, except fraud, are considered as waived by the payment.⁸ The deceit must be such that the insurer was entitled to rely upon it; for reliance without the right to rely would not give him a right of action. Thus, in *Canada Farmers' Mut. L. Ins. Co. v. Watson*,⁹ where, on discovery of a title falsely stated by the insured, the insurer threatened his arrest for obtaining money under false pretences and perjury, and the insured, to avoid arrest, gave the insurer a note for the insurance money, it was held,

¹ *Owens v. B. & O. R. R. Co.*, 35 Fed. R. 715 (S. D. Oh.).

² *Smith v. Nat. Benef. Soc.*, 51 Hun (N. Y.), 575.

³ See *Berry v. Amer. Cent. Ins. Co.*, 132 N. Y. 49; *Platt v. Continen. Ins. Co.*, 62 Vt. 166.

⁴ *Centen. Mut. L. Ins. Co. v. Parham*, 80 Tex. 518.

⁵ *McConnel v. Del. Mut. Safety Ins. Co.*, 18 Ill. 228; *Queen Ins. Co. v. Devinney*, 25 Grant Ch. (Can.) 394; See *post*, § 1036.

⁶ *Northw. Mut. L. Ins. Co. v. Elliott*, 5 Fed. R. 225 (D. Or.).

⁷ See *Nat. L. Ins. Co. v. Minch*, 53 N. Y. 144.

⁸ *Mut. L. Ins. Co. v. Wager*, 27 Barb. (N. Y.) 354; *Nat. L. Ins. Co. v. Minch*, 53 N. Y. 144; *Metropolitan L. Ins. Co. v. Harper*, 3 Hughes, 260 (W. D. Va.); *Brit. America Assur. Co. v. Wilkinson*, 23 Grant Ch. 151; *Royal Ins. Co. v. Byers*, 9 Ont. R. 120.

⁹ 25 U. C. C. P. 1.

in a suit on the note, that there could be no recovery, as it did not appear that the false statement as to title would have entitled the company to avoid the policy ; but a new trial was granted to let the company show this. The reliance, however, need not have been exclusively on the fraudulent representations of the insured, but there may be a partial reliance on other facts ; but the reliance upon the facts stated by the insured must be such that had they not been made the insurer would not have made the payment.¹ The fact that the insurer paid a few days before he was liable is an immaterial fact.²

451. It has been held that if the policy once attach, and there be an avoidance for a subsequent fraud, the insurer need not return the premium.³ And even if the policy has not attached, it has been generally held that the premium cannot be recovered back by the insured ; not on account of the insurer's right to retain it, but on account of the insured's demerit, for he cannot recover on setting up his own fraud.⁴ Therefore, where the insurer sets up the defence of fraud on a policy he need not show a prior tender of the premiums.⁵ And where on payment of the insurance-money the insurer takes the insured's receipt, it is not necessary to return this before bringing an action to recover the money paid, by reason of the insured's fraud ; as the receipt is not a thing of value given for the money received, but only evidence of its payment.⁶

452. The burden of proof of fraud is on the insurer who sets it up.⁷ The question whether the facts show a fraudulent intent is for

¹ *Hart Ins. Co. v. Matthews*, 102 Mass. 221.

² *McLean v. Equit. L. Assur. Soc.*, 100 Ind. 127.

³ *Waters v. Sea Ins. Co.*, 5 Hill (N. Y.), 421.

⁴ *Chapman v. Fraser*, cited in *Park on Insurance*, 218 ; *Friesmuth v. Agawam Mut. F. Ins. Co.*, 10 Cush. (Mass.) 587 ; *Schwartz v. U. S. Ins. Co.*, 3 Wash. 170 (D. Pa.).

⁵ *Flynn v. Equitable L. Ins. Co.*, 78 N. Y. 568 ; *Blaeser v. Milwaukee Mechan. Mut. Ins. Co.*, 37 Wis. 31.

⁶ *Johnson v. Cont. Ins. Co.*, 39 Mich. 33.

⁷ *Leete v. Gresham L. Ins. Soc.*, 15 Jur. 1161 ; *Trenton Mut. L. Ins. Co. v. Johnson*, 4 Zab. (N. J.) 576 ; *Dwight v. Germania L. Ins. Co.*, 103 N. Y. 341 ; *State Ins. Co. v. Hughes*, 10 Lea (Tenn.), 461 ; *Mobile L. Ins. Co. v. Morris*, 3 Ib. 101 ; *Dwyer v. Continen. Ins. Co.*, 57 Tex. 181 ; *Northw. L. Ins. Co. v. Muskegon Bk.* 122 U. S. 501 ; *Clement v. Phoenix Ins. Co.*, 6 Blatch. 481 (D. N. Y.) ; *Huchberger v. Home F. Ins. Co.*, 5 Biss. 106 (N. D. Ill.) ; *Sibley v. St. Paul F. & M. Ins. Co.*, 9 Biss. 31 (N. D. Ill.) ; *Murphrey v. Old Dominion Ins. Co.*, 5 Ins. L. J. 297 (E. D. N. C.) ; *Oshkosh Packing, Etc.*,

the jury.¹ It was held in Wisconsin, that a finding by the jury that there was a false statement, but that it proceeded from a want of knowledge of the English language, and not from fraud, is consistent.²

DIVISION III.—FRAUD BY THE INSURER ON THE INSURED.

453. The insured may also avoid the contract,³ or bring an action of deceit by reason of the insurer's fraud;⁴ and an action of deceit will lie, although the insured is entitled to no greater damage than the amount of the premiums he has paid.⁵ Where the insurer is a company, the rules as to fraud which are applicable to contracts between individuals apply to contracts between the company and individuals.⁶

454. Where a director of a company wilfully causes false statements to be issued of the company's financial standing and condition, he is liable criminally,⁷ and also civilly in a suit by the party thereby deceived.⁸ And in the action of deceit no privity is needful, as in an action of contract.⁹ Where the fraudulent representations are alleged, it is no answer to say that the insured should have made proper inquiry as to the truth of the facts the insurer has misrepresented.¹⁰ An insurance of a ship which the insurer privately knows has arrived is a fraud.¹¹ So a deceitful misstatement of the insurance company's present financial position is a fraud upon the insured.¹² Where it has been fraudulently stated that the whole

Co. v. Mercantile Ins. Co., 31 Fed. R. 200 (E. D. Wis.); Carlwitz v. Germania F. Ins. Co., 12 Ins. L. J. 127 (D. N. J.).

¹ *Ionides v. Pender*, L. R. 9 Q. B. 531; *Carrugi v. Atlan. F. Ins. Co.*, 40 Ga. 135; *South. L. Ins. Co. v. Wilkinson*, 53 Ib. 535; *Penn Mut. L. Ins. Co. v. Crane*, 134 Mass. 56; *Schuster v. Dutchess Co. Ins. Co.*, 102 N. Y. 260; *Insurance Companies v. Weides*, 14 Wall. 375; *Upton v. Tribilcock*, 91 U. S. 45.

² *Stache v. St. Paul F. & M. Ins. Co.*, 49 Wis. 89.

³ *Spare v. Home Mut. Ins. Co.*, 17 Fed. R. 568 (D. Or.).

⁴ *Hedden v. Griffin*, 136 Mass. 229.

⁵ *Pontifex v. Bignold*, 3 M. & G. 63.

⁶ *Central R'way Co. v. Kisch*, 2 En. & Ir. Ap. 99.

⁷ *Burnes v. Pennell*, 2 H. L. C. 496.

⁸ *Ib.*; *Salmon v. Richardson*, 30 Conn. 360.

⁹ *Salmon v. Richardson*, *supra*.

¹⁰ *Central R'way Co. v. Kisch*, 2 En. & Ir. Ap. 99.

¹¹ *Carter v. Boehm*, 3 Burr. 1905.

¹² See *Burnes v. Pennell*, 2 H. L. C. 496; *New Era L. Ass'n v. Weigl*, 129 Pa. St. 577.

of the insurer's capital has been paid in, the fact that the holders of unpaid stock are amply able to pay it in on a call, does not render immaterial the false statement.¹ Nor would the fact that a recovery on the policy is limited to the result of a particular mortuary assessment render a fraudulent statement as to the insurer's financial condition immaterial.² But representations as to solvency are not disproved by the mere fact of a subsequent failure.³ In an action by the assignee in insolvency of an insurance company, upon a note given for a premium, in which the defence was that the note was procured through fraudulent representations as to the solvency of the company, and the amount of capital stock which had been paid in and invested, the defendant was allowed to prove that the funds paid in for instalments due upon subscriptions to the capital stock were immediately taken possession of by the treasurer, that no entry thereof was made in his account in the ledger of the company, that they were not deposited in the banks where the company kept its accounts, and that the shares of other corporations issued in the name of the president of the company, and which were said to have been purchased with the funds referred to, were shortly afterwards transferred by him to the person from whom they had been received.⁴ But a declaration of agents as to the method of calling in subscriptions for stock is not material where there is a charter and a written contract as to the matter.⁵ And it has been held that the subscriber cannot recover back the amount of a subscription to stock induced by fraudulent representations if there are creditors to an equal or larger amount on debts contracted after his subscription; for as to such the funds of the corporation, including his subscription, would be held in trust for their payment.⁶

455. Fraudulent representations as to the future capabilities of the company have also been held to be ground for an action of deceit. Thus, in *Gerhard v. Bates*,⁷ where the directors issued a prospectus advertising shares which would be profitable, intending to deceive and induce the people to buy, and fraudulently adver-

¹ *New Era L. Ass'n v. Weigle*, 128 Pa. St. 577.

² *New Era L. Ass'n v. Weigle*, *ib.*

³ *L. Ass'n v. Goode*, 71 Tex. 90.

⁴ *Fogg v. Griffin*, 2 Allen (Mass.), 1.

⁵ *Payson v. Withers*, 5 Biss. 269 (D. Ind.).

⁶ *Turner v. Grangers' L. & Health Ins. Co.*, 11 Ins. L. J. 329 (Ga.).

⁷ 2 E. & B. 476.

tised that the shares would yield a minimum dividend of thirty-three per cent. and the guarantee was to last till the price of the shares should be repaid, it was held that the purchaser who bought relying on this, could bring an action, as the purchase was the direct result of the prospectus. And in *Penn Mut. L. Ins. Co. v. Crane*,¹ it was held that a note given for a premium may be avoided by fraudulent representations on the part of the company's agent that certain persons were to be members of the local board of directors.

456. The issue of a policy as of number 50 in class 4 is held not to create a presumption that forty-nine had been issued in the same class, and not therefore a fraud on the part of the company.² Though apparently a different view has been entertained in another Court.³ It is fraud to intentionally issue a policy different from the one contracted for;⁴ or when it is handed to the insurer for renewal to alter its terms.⁵ Fraud on the part of the insurer in making an assessment is a good defence by the insured.⁶ But the company is entitled to recover on an otherwise valid assessment, unless the amount is so large as to satisfy the jury of fraud or gross mistake.⁷ The Courts have frequently commented upon the frequent use by the underwriters in their policies of fine or nearly illegible type, but it is believed that in no case has this been held to constitute a fraud.⁸ If the agent, fraudulently, by coercion, induces the insured to surrender a policy, the cancellation is void; but where he only makes use of strong argument to induce one to surrender a policy, and tells him finally to act on his own judgment, and the insurer's mind was not guided by him, this would not constitute a fraud.⁹

457. With respect to fraudulent representations on the part of the insurer to induce a compromise with the insured, it has been held, where knowledge of the facts alleged to have been misrepresented,

¹ 134 Mass. 56.

² *Atlan. Mut. F. Ins. Co. v. Goodall*, 9 Fost. (N. H.) 182.

³ *Chicago Mut. L. Indemnity Ass'n v. Hunt*, 127 Ill. 257.

⁴ *Sun. Mut. L. Ins. Co. v. Beland*, 5 L. N. Can. 42.

⁵ *Hay v. Star F. Ins. Co.*, 77 N. Y. 235.

⁶ *People's F. Ins. Co. v. Hartshorne*, 90 Pa. St. 465.

⁷ *Susquehanna Mut. F. Ins. Co. v. Gackenback*, 19 W. N. C. (Pa.) 287.

⁸ See *Keller v. Equit. F. Ins. Co.*, 28 Ind. 170; *Meyer v. Queen Ins. Co.*, 41 La. An. 1000; *Ervin v. N. Y. Cent. Ins. Co.*, 3 T. & C. (N. Y.) 213; *Morrison v. Ins. Co. of N. A.*, 69 Tex. 353; *Ins. Co. v. Slaughter*, 12 Wall, 404; *Whitehouse v. Traveller's Ins. Co.*, 7 Ins. L. J. 23 (D. N. H.).

⁹ *Stilwell v. Mut. L. Ins. Co.* 72 N. Y. 385.

as that the policy was irregularly issued, can be acquired with reasonable diligence by both parties, the insured can not set aside the compromise.¹ If the misrepresentation be as to a material fact which the insured was entitled to, and did rely on, the compromise will be avoided.² But a mere expression of opinion is not ground for setting it aside.³ Nor is a false statement as to a point of law, made to influence the insured in compromising, ground for avoiding the compromise.⁴

Where the insured made a soliciting agent, through whom the application was forwarded for approval, his own agent to receive and send the policy to him, it was held, the jury finding there had been a delivery of the policy by the company to this agent, that the fact that the agent concealed the delivery from the insurer was not concealment or fraud on the part of the insurer, as the agent acted for the insured, and therefore a compromise could not for this reason be held void.⁵

458. Where, in an action against the directors for fraudulent representations as to the company's financial condition, one of them denied any participation in the fraud, and all knowledge of the fact that certain bonds belonging to him were represented by the officers as belonging to the company, the plaintiff was allowed to show that before the representations had been made the director was solicited by the president to arrange that the bonds should be represented as belonging to the company, and also that a receipt had been given by him to the company acknowledging the bonds were held by him subject to the company's order.⁶ The acts of a director after the insurance is effected which are connected with the previous fraudulent misrepresentation may be shown.⁷ And in an action by A. against B., C., and D., for fraudulent misrepresentations made as directors, conversations between B. and C., and between C. and E., a former

¹ *Dunn v. Commw. Ins. Co.*, 1 Flip. Me. 55; *Dunn v. Commw. Ins. Co.* 1 Flip 379 (N. D. Ill.).

² *Derrick v. Lamar Ins. Co.*, 74 Ill.

404; *Matthews v. General Mut. Ins. Co.*,

9 La. An. 590; *Ætna Ins. Co. v. Reed*, 33 Oh. St. 283.

³ *Ætna Ins. Co. v. Reed*, 33 Oh. St. 283.

⁴ *Rashdall v. Ford*, L. R. 2, Eq. Cas. 750; *Thompson v. Phoenix Ins. Co.* 75

⁵ *Morrison v. Ins. Co. of N. A.*, 69 Tex. 353.

⁶ *Ford, supra*; *Thompson v. Phoenix Ins. Co.*, 75 Me. 55; *Dunn v. Commw. Ins. Co.*, 1 Flip. (379 N. D. Ill.).

⁷ *Salmon v. Richardson*, 30 Conn. 360.

agent of the company, with reference to the state of the property, were held admissible to show the *bona fides* of the defendants in making the statements, though they are not evidence of the truth of the facts stated.¹ Where fraudulent representations have been made by promoters and directors of a proposed company, one who subsequently becomes and acts as a director with notice makes himself liable.²

459. The general rule of law is that a principal is bound by the act of his agent while proceeding within the line of his duty, and therefore where the insurer causes his agent to make fraudulent representations he is bound by the latter's misstatements, and the contract may be avoided though the agent may be innocent of the falsehood.³ Fraudulent misrepresentations of a general agent in regard to the company's solvency, which are repeated to the local agent, who in turn repeats them to the insured, and thereby induces the latter to insure, may be shown by parol evidence on an action on the premium note.⁴ And where a false statement has been made by the general to the local agent, evidence is admissible to show that certain officers of the company in the general agent's presence and in the presence of the witnesses reiterated the same falsehoods.⁵ It was held in *Cornfoot v. Fowke*,⁶ in a suit by a landlord for rent, that it was no defence to show that the agent had innocently represented the premises as unobjectionable, whereas in fact there was a brothel in the adjoining house, which was a nuisance, of which fact the principal was aware but had said nothing about the matter to the agent, on the ground that the representation was collateral and unauthorized. But the authority of this case on this point has been often questioned.⁷

460. It has been held that the fraudulent representations of an agent will not render an innocent principal liable in an action of deceit, though the insured may rescind or avoid the contract or defend

¹ *Shrewsbury v. Blount*, 2 M. & G. 475.

² *Beeching v. Lloyd*, 3 Eq. Rep. 737.

³ *Sunbury F. Ins. Co. v. Humble*, 100 Pa. St. 495.

⁴ *Ib.*

⁵ *Ib.*

⁶ *M. & W.* 358.

⁷ See *Fuller v. Wilson*, 3 Q. B. 58, reversed in error on the ground that there was no misrepresentation: 3 *Ib.* 1009; *Nat. Exchange Co. v. Drew*, 2 MacQ. H. L. C. 103; *Wheelton v. Hardisty*, 8 E. & B. 232; *Barwick v. English Joint Stock Bk.*, L. R. 2 Ex. 259.

in a suit by the insurer on it.¹ Though where the principal has profited by the deceit of the agent, acting in the scope of his authority, such an action has been held to lie.² Thus, in *Brook v. Refuge Assur. Co.*,³ the insured was allowed to recover back the money he had paid for a policy which he had been induced to take on an uninsurable life through the fraud of the insurer's agent. But in *Amer. Steam Boiler Ins. Co. v. Wilder*,⁴ where the insurer's agent induced the insured to take out a policy, untruthfully representing that his company was better than a rival, it was held that the insured could not rescind, for the agent's language was in the nature of "trade talk" in sales, and should have been taken *cum granis*; and besides the insured was also asked to compare the policy of the company with that of its rival, which had he done he could have discovered the truth.

But while an action of deceit will lie against an officer or agent of a corporation for his fraudulent misrepresentation,⁵ and while there is certainly very high authority for stating it will not lie against the corporation for the deceit of its agents,⁶ several Courts of very great reputation have decided that such an action will lie against a corporation for its agent's deceit as for any other tort of its agent, and there are besides *dicta* to the same effect.⁷ In any event, whether an action of deceit will lie or not, the insured may avoid or rescind the contract if he is in a position to do so, as the principal would not be permitted to enforce a contract made by the fraud of

¹ *Kennedy v. McKay* 43 N. J. L. 288; *v. Midland Counties R'way Co.*, 10 Ex. West. Bank of Scotland *v. Addie* L. R. 1 Sc. Ap. 146.

² *Mackay v. Bk. Commer. Bank of New Brunswick*, L. R. 5 P. C. 394. See *Weir v. Bell*, 3 Ex. D. 238.

³ 91 L. T. 143.

⁴ 18 Ins. L. J. 70 (Minn.).

⁵ *West. Bank of Scotland v. Addie*, L. R. 1 Sc. Ap. 146; *Tebbetts v. Hamilton Mut. Ins. Co.*, 3 Allen (Mass.), 569; *Hedden v. Griffin*, 136 Mass. 229.

⁶ See *West. Bk. of Scotland v. Addie*, L. R. 1 Sc. Ap. 146; Remarks of Lord Bramwell in *Abrath v. N. E. R'way Co.*, 11 Ap. Cas. 247; *Kennedy v. McKay*, 43 N. J. L. 288, 43; *Stevens*

⁷ See *Barwick v. English Stock Bank*, L. R. 2 Ex. 259; *Mackay v. Commer. Bank*, L. R. 5 P. C. 394; *Fogg v. Bost. & Lowell R. R. Co.*, 148 Mass. 513; *Peebles v. Patapsco Guano Co.*, 77 N. C. 233; *N. Y. Etc., R. R. Co. v. Schuyler*, 34 N. Y. 30; *Cragie v. Hadley*, 99 N. Y. 131; *Erie City Iron Works v. Barber*, 106 Pa. St. 125; *Butler v. Watkins*, 13 Wall. 456. See also *Bk. of New South Wales v. Owston*, 4 Ap. Cas. 270; *Edwards v. Midland R'way Co.*, 6 Q. B. D. 287; *Houldsworth v. City of Glasgow Bk.*, 5 Ap. Cas. 317; *Green v. Lond. General Omnibus Co.*, 7 C. B. s. 290.

his agent for his benefit.¹ In accordance with a somewhat similar principle it was held, in *N. Y. L. Ins. Co. v. McGowan*,² that where the general agent fraudulently induced the insured to accept on a settlement a fourth of what the company had given him to pay, the company was liable for what the insured was cheated out of. And in *McLean v. Equitable L. Assur. Soc.*,³ a settlement was set aside which was procured through the agent representing to the insured's executor, whose faculties were somewhat impaired, that the company had a good defence and would contest the claim, and induced him thus to accept a sum grossly under the value of the policy. And also in *Labor v. Mich. Mut. L. Ins. Co.*,⁴ where the agent had persuaded a feeble-minded husband to surrender a policy issued for the benefit of his wife and accept a policy for its surrender value, saying that the former had been forfeited, it was held the wife could, within a reasonable time, file a bill and re-establish the policy. But the fraud of the company's agent on the insured in another transaction, not brought to the notice of the insured, cannot affect him. Thus, where on an action to recover from the company money alleged to have been paid to an agent, who had fraudulently procured an assignment of it, in fraud of the insured's estate, it was held that it must be shown that the company had notice of the fraud.⁵ And the agent's declarations in such a case after his office has ceased are not evidence against the company.⁶

461. The insured may show by parol evidence that he was fraudulently induced by the agent to insure, and subsequently kept in ignorance of the policy's stipulations.⁷ But evidence that the agent made the same representations to others which were made to the insured, and which the insured alleged were fraudulent, is only ad-

¹ See *West. Bk. of Scotland v. Ad-* *Martin v. Ætna L. Ins. Co.*, 4 Ins. L. J. 899 (Tenn.); *Lycoming F. Ins. Co. v. Wright*, 55 Vt. 526.

Whitman, 33 Ind. 64; *Whitman v. Meissner*, 34 Ind. 487; *Afner. Ins. Co. v. Pressell*, 78 Ind. 442; *Fogg v. Griffin*, 2 Allen (Mass.), 1; *Penn Mut. L. Ins. Co. v. Crane*, 134 Mass. 56; *Upton v. Jackson*, 4 Ins. L. J. 189 (Mich.); *City Bank v. Phillips*, 22 Mo. 85; *Devendorf v. Beardsley*, 23 Barb. (N.Y.) 656; *Jones v. Dana*, 24 Ib. 395; *Holbrook v. Wilson*, 4 Bos. (N. Y.) 64; *Lycoming F. Ins. Co. v. Woodworth*, 83 Pa. St. 223;

² 18 Kan. 300.

³ 100 Ind. 127.

⁴ 44 Mich. 324.

⁵ *Northw. Mut. L. Ins. Co. v. Roth*, 87 Pa. St. 409.

⁶ *Ib.*

⁷ *McKenzie v. Planter's Ins. Co.*, 9 Heisk. (Tenn.) 261. See *Hart. Steam Boiler Ins. Co. v. Cartier*, 89 Mich. 41.

missible to show the representations to the insured were fraudulent, and, therefore, unless there is evidence tending to show the statements made to other people were false or fraudulent such representations are immaterial.¹

462. Where the insured makes truthful representations to the insurer's agent, who fraudulently transcribes them incorrectly in the application, which the insured signs, and which is the basis of the contract upon which the policy is issued, on the theory that the fraudulent misstatements are truthful or warranties, it has been more than once contended that the insured cannot successfully maintain an action on a policy, by alleging that he had stated the truth, and offering to show this by parol evidence.² Because one of the elements of a contract, namely mutuality, is wanting. For first, the agent did not intend to make the contract the insured intended, but did intend to make a different contract based on a different state of facts; and secondly, the insured by signing the application and accepting the policy accepts the agent's form of contract, and not the different form of contract the insured had originally intended. The insured might well say there is no contract, but he cannot logically be heard to say there is a contract; for how can he be heard to say the instrument he sues on does not represent the contract, for breach of which he claims damages? It is also insisted that the equitable principle of reformation will not assist the insured, for logically a contract can only be reformed when the mistake is mutual, and here the mistake, if any, is only on one side. Nor can the insured be helped on the moral ground that he had been injured fraudulently, for he is guilty of supine negligence in not reading what he signed, either before or soon after he signed it. Nor can the principle of estoppel avail the insured; for though the insured might be estopped from setting up that the written contract he sues on does not represent what he intended, estoppel cannot be invoked against the insurer to prevent him from asserting that the policy represents the contract. Nor can the rule that a principal is liable for the fraud of his agent assist him, for if the principal had himself acted instead of the agent the insured would still be put in the position of suing on a contract which the other party never intended to make.

¹ U. S. L. Ins. Co. v. Wright, 8 Ins. Co., 3 Allen (Mass.), 569. See Massey v. Penn Mut. L. Ins. Co., 10 Ins. L. J.

² See Tebbetts v. Hamilton Mut. Ins. 82 (Pa.).

It is quite true that the fraud may make the agent, or the principal if he concurs in it, liable in an action founded on deceit, or that the fraud may be a ground of rescission or avoidance, but it is inconceivable that fraud alone can create a contract. Whatever may be the force of the above reasoning, on some ground of public policy, possibly to protect the insured when he cannot protect himself, it has been frequently decided that when the agent fraudulently transcribes the statements of the insured, the insurer will be bound by what the insured really said. And the latter may show by parol evidence what he did say, and the contract will be assumed to be based on what the insured said, and not on what the policy disclosed it to be.¹

463. The agent, to bind his principal, must act within his authority in making the fraudulent misrepresentations, for if he was without authority to make representations at all, the representations he did make could not affect his principal, for the insured would not be entitled to rely upon them,² though *Lycoming F. Ins. Co. v. Woodworth*,³ may possibly be considered as holding a contrary view. Upon this principle the Courts, which hold that the insurer is bound where the agent has fraudulently transcribed the insured's truthful statement in the application signed by the insured, have limited the principle to cases of agents armed with general powers.⁴

¹ See *Cook v. Lion F. Ins. Co.*, 67 Cal. 368; *Commer. Un. Assur. Co. v. State*, 113 Ind. 331; *Phoenix Ins. Co. v. Stark*, 120 Ind. 444; *Hopkins v. Hawkeye Ins. Co.*, 57 Iowa, 203; *McArthur v. Home L. Ass'n*, 73 Iowa, 336; *Sullivan v. Phoenix Ins. Co.*, 34 Kan. 170; *Continental Ins. Co. v. Pearce*, 39 Kan. 396; *Temmink v. Metropolitan L. Ins. Co.*, 72 Mich. 388; *Rivara v. Queen's Ins. Co.*, 62 Miss. 720; *Grattan v. Metropolitan L. Ins. Co.*, 92 N. Y. 274; *Mass. L. Ins. Co. v. Eshelman*, 30 Oh. St. 647; *Cheever v. Un. Cent. L. Ins. Co.*, 5 Ins. L. J. 159 (Oh.); *Cumberland Val. Mut. Protective Ins. Co. v. Schell*, 29 Pa. St. 31; *Eilenberger v. Protective Mut. F. Ins. Co.*, 89 Pa. St. 464; *Schwarzbach v. Protec. Un.*, 25 W. Va. 622; *Kister v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 553; *Fletcher v. N. Y. L. Ins. Co.*, 14 Fed. R. 846 (E. D. Mo.); *Redford v. Mut. F. Ins. Co.*, 38 U. C. Q. B. 538.

² *Burnes v. Pennell*, 2 H. L. C. 497; *Partridge v. Albert L. Assur. Co.*, 16 Solic. J. 199; *Pinchin v. Realm Ins. Co.*, cited in *Porter on Insurance*, 436; *Hackney v. Allegheny Co. Mut. Ins. Co.*, 4 Pa. St. 185.

³ 83 Pa. St. 223.

⁴ *Ryan v. World Mut. L. Ins. Co.*, 41 Conn. 168; *Mensing v. Amer. Ins. Co.*, 36 Mo. Ap. 602; *Sykora v. Ins. Co.*, 2 Bull (Oh.), 223; *N. Y. L. Ins. Co. v. Fletcher*, 117 U. S. 519, reversing the same case in 13 Fed. R. 526 (E. D. Mo.); *Lee v. Guardian L. Ins. Co.*, 5 Big. L. & A. Cas. 18 (D. Cal.).

464. Where one is induced to insure on the faith and representations of a holder of illegal shares of stock of a company, being an over-issue, the remedy of the insured is in Case against the subscriber.¹

465. It has been held that one neither insured nor beneficiary cannot set up the insurer's fraud, though he has caused the insurance to be effected and paid the premiums.² But the fraud of a former beneficiary, in concert with an officer of the company, in preventing a change of a beneficiary's name in a certificate, when the member has taken all the necessary steps to effect the change, will not affect the second beneficiary because of irregularities in the change.³

The insured must return money paid under an adjustment which he claims was fraudulent.⁴ In *Kellner v. Mut. L. Ins. Co.*,⁵ it was held that the insured could not rescind for fraud after a life insurance on the endowment plan had been carried for ten years.

DIVISION IV.—FRAUD BY THE INSURED ON THIRD PARTIES.

466. An assignment of a wife's policy procured by the husband's coercion is void. It is difficult to define what coercion is. Mere persuasion and ordinary marital influence are not fraudulent.⁶ But where there are threats, and the wife is put in bodily fear, this would constitute coercion.⁷ Where a creditor took a policy assigned by the wife under coercion on the part of her husband, of which the creditor was ignorant, as collateral security for a debt, the assignee was held not an innocent holder for value.⁸ Where a wife, through coercion, assigns a policy to her husband's creditor it was held that she can testify in a suit by her against the creditor after her husband's death, as the title was not derived by the creditor from the deceased, but from her, since the policy was hers and by her assigned for her husband's debt.⁹ But it has been held that a wife may

¹ *Clark v. Turner*, 73 Ga. 1.

⁶ *Conn. Mut. L. Ins. Co. v. Ryan*, 8

² *N. Amer. L. Ins. Co. v. Wilson*, 111

Mo. Ap. 535.

Mass. 542; *U. S. L. Ins. Co. v. Wright*,
8 Ins. L. J. 169 (Oh.).

⁷ *Barry v. Equit. L. Assur. Soc.*, 59
N. Y. 587; *Eadie v. Slimmon*, 26 N. Y.
9; *Fowler v. Butterly*, 12 J. & S. (N.
Y.) 148.

³ *Marsh v. Supreme Council*, 149
Mass. 512.

⁴ *Potter v. Monmouth Mut. F. Ins.*
Co., 63 Me. 440.

⁸ *Barry v. Equit. L. Assur. Soc.*, 59
N. Y. 587.

⁵ 43 Fed. R. 623 (D. N. J.).

⁹ *Ib.*

legally cajole her husband into insuring and giving herself a policy of insurance.¹

467. Sales of life policies by the insured have been set aside for fraudulent misrepresentation or concealment on the part of the buyer or seller. Thus where the defendant, learning that the life named in the policy was very ill, treated for it with the plaintiff the holder of the policy, for a small sum, representing its value to be what it might have been had the life been in good health, the Court set the transaction aside.² But the sale by an auctioneer of a policy on the life of a third party was held not voidable for fraud, merely because the auctioneer did not state that the vendor had only a redeemable interest in the life, which was afterwards redeemed; the practice of the insurance office being to pay on such policies without inquiring into the continuance of interest, and there had been no improper concealment.³ In *Scott v. Roose*,⁴ the defendant's clerk insured his own life, the policy stipulating that only one who had an interest could insure. Shortly afterwards he assigned it to the defendant, in consideration of the latter increasing his salary and paying the expenses of the insurance. Three weeks later, without sufficient cause the clerk was dismissed, and the money was paid into Court by the insurance office. The clerk's executors filed a bill against the defendant to set the assignment aside as fraudulent, and the prayer of the bill was allowed.

468. A policy of fire insurance, as has been stated,⁵ is not an incident of the property; and where property is conveyed to a wife in order to defraud the husband's creditors, and she insures, the policy will not go to the creditors as proceeds from the subject-matter, nor on a loss will the money stand in lieu of the property.⁶

469. Policies of life insurance are, since the Act of 1 and 2 Vict., c. 110, s. 12, within the Statute of 13 Elizabeth, c. 5, as to Fraudulent Conveyances, being securities for money.⁷ And also within the Mississippi Statute.⁸ Though they are not "goods and

¹ *Pingree v. Jones*, 80 Ill. 177.

² *Jones v. Keene*, 2 M. & R. 348. See *Stokoe v. Cowan*, 29 Beav. 637.

³ *Barber v. Morris*, 1 M. & R. 62.

⁴ 3 Ir. Eq. 170.

⁵ § 202.

⁶ See *McLean v. Hess*, 106 Ind. 555;

Lerow v. Wilmarth, 9 Allen (Mass.), 362; *Bernheim v. Beer*, 56 Miss. 149.

⁷ *Stokoe v. Cowan*, 29 Beav. 637; *Elliott's Appeal*, 50 Pa. St. 75.

⁸ *Catchings v. Manlove*, 39 Miss. 655.

chattels" within the Revised Statutes of 1874,¹ of Illinois.² And it may perhaps be laid down as a very prevalent, if not general, rule that a voluntary assignment of a life policy by an insolvent, unless some Statute permits it,³ is avoidable as to creditors. In England, Canada, and in most of the United States, statutes exist upon the subject which define the rights of creditors in life policies, taken for or assigned to third parties, and the law of each Commonwealth will be separately considered.

470. It has been held in England, that a contract by which money should go to the insured's children in case he should make no appointment was valid, though it was a withdrawing of money from the payment of debts.⁴ In the case in which this point was decided there were no debts, and the claimants were legatees under a will.

The English Married Woman's Act of 1870⁵ allowed a married woman to insure, and provided that a policy by her husband on his life expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, should enure and be deemed a trust, etc., freed from his creditors. Where a husband insured and paid one premium before the passage of this Act, and after its passage exchanged the policy for one to his wife's separate use if she survived, but to him if he did, it was held that the policy was within the Act,⁶ though he was then embarrassed. And where the agent who had the instructions and received the first premiums on a policy intended by the husband to be for his wife within the Act absconded and died, and the husband died insolvent, without leaving instructions with the company, and the company after his death prepared a policy, antedating it as before his death, asking instructions of the Court to whom to give it, it was held that evidence of the husband's intentions was admissible; that the policy issued by the company must be annulled, and a new one modelled for the widow, in accordance with the insured's intentions.⁷ Under this Act the policy would belong to the wife, though premiums paid after the insolvency could be recovered back by the creditors.⁸

¹ C. 68, s. 9.

² *Cole v. Marple*, 98 Ill. 58.

³ *Ib.*; *Catchings v. Manlove*, 39 Miss. 655; *Elliott's Ap.*, 50 Pa. St. 75.

⁴ *Davies v. Davies* [1892], 3 Ch. 63.

⁵ 33 & 34 Vict., c. 93, s. 10, repealed by the Act of 1882, which, however,

contains a somewhat similar provision as to a wife's policy.

⁶ *Holt v. Everall*, 2 Ch. D. 266.

⁷ *Newman v. Belsten*, 76 L. T. o. s. 228.

⁸ *Holt v. Everall*, 2 Ch. D. 266.

471. In Alabama, the Code¹ allows the wife, in her own name, or in the name of any third person with his assent as trustee, to insure the life of her husband, and the proceeds of the policy are freed from the claims of his creditors when the annual premiums do not exceed \$500.² The Act is to be liberally construed, and a policy taken by the wife and paid for by the husband, or one taken by him without her knowledge for her benefit is within it.³ The children may be beneficiaries to the same extent, but this does not permit a gift of such policy by an insolvent for one of several children.⁴ By the later Code⁵ the husband may take out in the same amount a policy payable to his wife, and, on her predeceasing him, to her children.⁶ But such a policy, payable in the event of her predecease to her heirs, etc., in the event of her prior decease would not vest any interest in the children which would prevail against the husband's creditors.⁷ A policy by the husband payable to the wife, her heirs, etc., in the event of her husband's death, but to him if he lived a stated number of years, can be set aside by creditors as not within the Act.⁸ In California, the Statute provides that a life policy is not subject to the process of creditors when the annual premium is not in excess of \$500,⁹ and an endowment policy is within the Act.¹⁰ In Connecticut, it was held that as a general rule it is a fraud for an insolvent, however innocently, to assign a like policy to his wife.¹¹ The Florida Act provides that the policy shall enure to the persons for whom it is taken, free from the insured's creditors, unless it is stated to be for creditors, and a mere direction on the policy taken out by the insured for himself, his heirs, etc., to pay to a beneficiary is sufficient.¹² And a policy by the insured "for the benefit of the estate of the insured" was held to be within the Act.¹³

¹ §. 2733.

² *Felrath v. Schonfield*, 76 Ala. 199.

³ *Ib.*

⁴ *Fearn v. Ward*, 65 Ala. 33; 80 *Ib.* 555.

⁵ Code 1876, s. 2733-4, and Code 1886, s. 2356.

⁶ *Tompkins v. Levy*, 87 Ala. 263.

⁷ *Ib.*

⁸ *Ib.*

⁹ *Briggs v. McCullough*, 36 Cal. 542.

¹⁰ *Ib.*

¹¹ *Barbour v. Conn. Mut. L. Ins. Co.*, 61 Conn. 240.

¹² *Eppinger v. Canepa*, 20 Fla. 262. See also *May v. May*, 19 *Ib.* 373; *Re Bear & Steinberg*, 11 Nat. Bank. Reg. 46 (S. D. Miss.); *Trough's Est.*, 8 Phila. 214; *Ex parte Spiers*, 9 L. Can. R. 450.

¹³ *Pace v. Pace*, 19 Fla. 438.

472. In Illinois, the wife is entitled under the statute¹ to a policy taken for her benefit exempt from creditor's claims, provided where the premiums are paid by one to defraud his creditors, "an amount equal to the premium so paid, with interest thereon, shall enure to the benefit of said creditors," subject, however, to the Statute of Limitations, which is five years. Therefore, an assignment by an insolvent of a policy taken out by himself on his own life to his wife is valid, and the creditor can only recover the premiums paid during the five years prior to the legal proceedings.² In Indiana, while doubting whether creditors were entitled to any proceeds of a policy of an insolvent taken as a provision for his family, which was reasonable in amount, the Court said, in any event the creditor's claim would be restricted to the aggregate amount of the premiums paid by the insolvent.³ In Kentucky, apparently at the common law, a man may provide up to a reasonable amount for his children by life insurance, which his creditors cannot touch, and since the Act of 1870 he may pay an annual premium of \$100, as it allows him to insure for this object, and does not limit the premium.⁴ A policy for the wife's benefit, issued prior to the Act and falling due afterwards, was held within its scope, except as respects the premiums paid by the insolvent prior to the Act, on the ground that life policies are kept in force from year to year at the will of the insured, and are annually renewed, and as the insured might have lapsed the policy and taken out a fresh one under the Act, the same result would be reached by keeping up the one issued before the Act.⁵ The policyholder's interest in the Kentucky Masonic Life Insurance Company is by the statute⁶ freed from his debts, but the money payable to the representatives is not.⁷

473. By the Maine Act,⁸ the insured, if insolvent, can only will the policy where there are a wife and children, otherwise it is assets for debts.⁹ In Maryland, a voluntary assignment by one to his wife and children, free from his creditors' claims, is good under the Act

¹ R. S. 1874, c. 73, s. 54.

² *Cole v. Marple*, 98 Ill. 58.

³ *Pence v. Makepeace*, 65 Ind. 345.

See also *Johnson v. Alexander*, 125 Ind. 575.

⁴ *Stokes v. Coffey*, 8 Bush (Ky.), 533; *Thompson v. Cundiff*, 11 Ib. 567.

⁵ *Thompson v. Cundiff*, 11 Bush (Ky.), 567.

⁶ Dec. 18th, 1867.

⁷ *Geiger v. MoLin*, 78 Ky. 232.

⁸ R. S. c. 75, s. 10.

⁹ *Hathaway v. Sherman*, 61 Me. 466.

of 1878, c. 200, though the assignor was embarrassed at the time of the assignment.¹ In Massachusetts, the statute² provides for a married woman's policy, but if the premium is paid by a person with intent to defraud his creditors, "an amount equal to the premium so paid, with interest thereon, shall enure to the benefit of his creditors, subject, however, to the Statute of Limitations;" and it was held, even where the husband and wife combine to cheat the creditors,³ only the premiums with interest can be recovered by them.⁴ In Michigan, under the Act of 1878, c. 34, §§ 368, 369, the creditors are not entitled to the money in certain beneficial societies unless in excess of five thousand dollars.⁵ And apparently a policy taken by the insured and made payable to himself, etc., and assigned later to his wife or children, will not be freed from creditors, though it would have been had it been originally taken for them.⁶ The Code of Mississippi provides that "the amount of any life insurance policy not exceeding ten thousand dollars upon any life shall enure to the party or parties named as beneficiaries thereof, freed from all liability for the debt of the person paying the premiums thereon;" but it has been held, if the beneficiary pays the premiums he cannot claim the exemption, as the Code means another than the beneficiary.⁷ In Missouri, an insolvent may, by the statute, pay an annual premium for a wife's policy up to \$300,⁸ but the policy is not free from creditors when the annual premium exceeds that amount.⁹ And if while solvent he insure in a greater amount and keep up the policy while insolvent, the proceeds of the policy shall be divided between the widow and creditors in the proportion as the premiums paid while solvent bear to those paid while insolvent.¹⁰ In the Federal Court for the Eastern District of Missouri, a different rule was stated, and it was apparently decided that only the proceeds of the policy which were produced by premiums in excess of \$300 annually should go to his estate or creditors.¹¹

¹ *Elliott v. Bryan*, 64 Md. 368;

⁷ *Yale v. McLaurin*, 66 Miss. 461.

Karushaw v. Stewart, *ib.* 513.

⁸ *Pullis v. Robison*, 73 Mo. 201, reversing s. c. 5 Mo. Ap. 548. See also

² Pub. Sta., c. 119, s. 167.

³ *Ingles v. New Eng. Mut. L. Ins. Co.*, 15 Ins. L. J. 557 (Mass.).

Charter Oak. L. Ins. Co. v. Brant, 47 Mo. 419.

⁴ *Brown v. Balfour*, 46 Minn. 68.

⁹ *Ib.*

⁵ *Ionis Co. Sav. Bk. v. McLean*, 84 Mich. 626.

¹⁰ *Ib.*

⁶ 1880, s. 1261.

¹¹ *Re Yeager*, 5 Ins. L. J. 238 (E. D. Mo.).

In a wife's policy the life need not be the husband,¹ and it has been held by the Federal Court, if an assignment of a policy for the wife, in which the wife has joined the husband, is set aside by the Federal Court, sitting in bankruptcy, her rights reattach as before the assignment.² In New Hampshire, the ordinary contract of membership in a mutual benefit association is a life insurance, within the General Laws, c. 175, and on the insolvency of the estate of the deceased does not subject the proceeds of the insurance to the insured's debts.³

474. The New York Statutes allow the husband to pay annually for insurance for his wife, exempt from his debts, \$500, and provide that the excess of premium over that sum, with interest, shall enure to the benefit of the creditors; but if after the contracting of a debt the premium does not exceed that amount, though before the debt it did, the creditor can acquire no lien.⁴ The interest of a creditor in such a policy, where the debtor husband pays over \$5⁽⁰⁰⁾ per annum, may in equity be impressed on the contract before the death, and the wife and her husband may be enjoined from transferring except to preserve it, and a like judgment may be rendered as to the future contingent rights of children.⁵ And *semble* a creditor, after an adjudication as to his rights, might keep on *for* the policy himself on general equitable principles.⁶ The *Ohio* Statute allows a man to insure, for his widow or children, exempt from creditors, up to an annual premium of \$150; and in case of an excess the insured's representatives shall be paid so much of the proceeds of the policy as \$150 shall bear to the whole annual premium.⁷ And this applies to companies organized outside of Ohio.⁸ The wife also in Ohio, is permitted by statute to insure out of her separate estate for her own benefit, as well as the husband for her benefit, and in the first case she can name what amount she pleases. Where the husband signed the application in his own name, but

¹ *Re Yeager*, 5 Ins. L. J. 238 (E. D. Y.), 244. See also *Keller v. New Mo.*)
Eng. Mut. L. Ins. Co., 14 Ins. L. J. 310

² *Ib.*

(N. Y.).

³ *Mellows v. Mellows*, 61 N. H. 137;
Smith v. Bullard, *ib.* 381.

⁶ *Stokes v. Amerman*, 121 N. Y. 337.

⁷ *Cross v. Armstrong*, 44 Oh. St. 613.

⁴ *Baron v. Brummer*, 100 N. Y. 372. See *Child v. Graham*, 7 Bull. (Oh.)

⁵ *Stokes v. Amerman*, 121 *ib.* 337. 43.

See *Masten v. Amerman*, 51 Hun (N. Y.) 43. ⁸ *Cross v. Armstrong*, 44 Oh. St. 613.

acted in the transaction as his wife's agent, it was held to be her policy.¹

In Ohio, the husband's creditors are entitled, under a policy taken by a married woman on her husband's life, payable to herself, only to the value of an excess over a certain amount of premiums; but under a policy taken by the husband and payable to his wife they are entitled to the insurance money beyond a certain sum. And a policy purporting to have been taken by a married woman on her husband's life, payable to herself, but to her children if she predeceased them, is, *prima facie*, the sole property of the wife; and, in order to recover at all in such a case the creditors must show an insolvency at the husband's decease, and that some of the premiums were paid in fraud of creditors.²

In Pennsylvania, before the Act of April 15, 1868, s. 1,³ an assignment of a policy by an insolvent was voidable.⁴ Though a policy taken without fraud directly for the insured's wife could not be set aside by creditors.⁵ And if the assignment of a policy was made while solvent, the creditors would only be entitled to the premiums paid while insolvent.⁶ By virtue of the Act a *bona fide* assignment to a wife is freed from creditors' claims.⁷ And under the Act, if one provides for his family or dependent relatives, by taking out a policy directly for them in their name, the title to it which is vested in such beneficiaries, is good notwithstanding the claims of the creditors of the insured, and the question of the good faith or fraud of the insured cannot arise in such a case.⁸ But if he takes out a policy to himself and assigns it to his wife, etc., afterwards the *bona fides* can be inquired into.⁹ Though the mere fact of insolvency does not necessarily show want of *bona fides* within the meaning of the Act.¹⁰ In Tennessee, under the Code,¹¹ a

¹ *Jacob v. Conn. L. Ins. Co.*, 1 Cin. S. C. R. (Oh.) 519.

² *Weber v. Paxton*, 48 Oh. St. 266.

³ "All policies of insurance or annuities on the life of any person, which may hereafter mature, and which have been or shall be taken out for the benefit of, or *bona fide* assigned to the wife or children or any relative dependent upon such person, shall be vested in such wife or children, or other relative,

free and clear from all claims of the creditors of such person."—P. L. 1868, page 103.

⁴ *Elliott's Ap.*, 50 Pa. St. 75.

⁵ *Ib.* See *McCutcheon's Ap.*, 99 Ib. 133.

⁶ *Trough's Est.* 8 Phila. 214.

⁷ *McCutcheon's Ap.*, 99 Pa. St. 133.

⁸ *Ib.*

⁹ *Ib.*

¹⁰ *Ib.*

¹¹ New Code Rec. 3135.

policy payable to the wife and children is free from the insured's debts.¹ And so is a policy taken by the insured and assigned to his wife and children.² And a policy taken to the insured, his executors, etc., goes to his family against the creditors if he dies intestate.³ But a policy issued to a man for the benefit of his creditors, and the balance, if any, made payable to his widow, was held not a wife's policy under the Code.⁴ By the Federal law, payments by a married insolvent, to keep on foot a policy for his wife, which she had taken for herself and children, is not *per se* fraudulent transfer within the Act of 18 Eliz. c. 5.⁵

475. In Ontario, a bachelor effecting life policies cannot subsequently, on his marriage, withdraw them from his creditors' claims by any indorsements, declarations, etc.; for he was not at the issue of policy a "married man" within the exception in 47 Vict., c. 20, sec. 2.⁶ In Lower Canada, by the Act of 29 Vict., c. 17, policies for the benefit of wives on their husbands' lives, whether taken or indorsed to them, are freed from the husband's debts.⁷

476. While the beneficiaries of life policies are entitled, under certain restrictions, to their proceeds, freed from the claims of creditors, there is, as a general rule, no exemption in respect of the creditors of the beneficiary.⁸ Thus, in New York, the insurance money deposited by the widow in a bank was held assets for her debts.⁹ Though it was held, where the policy was for the wife and children, the policy money received could not be attacked by her creditors.¹⁰ And it has been held that the wife's creditors cannot attack an assignment by her to her children of a life policy which was made payable for her sole use, if living, and if not, for the benefit of her children.¹¹ But as a married woman may under the statutes

¹ Gosling v. Caldwell, 1 Lea (Tenn.), 454; Harvey v. Harrison, 89 Tenn. 470.

² *Ib.*

³ Williams v. Corson, 2 Tenn. Ch. 269.

⁴ Gwynne v. Estes, 14 Lea (Tenn.), 662.

⁵ Central Bk. v. Hume, 128 U. S. 195.

⁶ Toronto Gen. Trusts Co. v. Sewell, 17 Ont. R. 442.

⁷ Vilbon v. Marsonin, 18 L. Can. J. 249.

⁸ See Smedley v. Felt, 43 Iowa, 607; Norris v. Mass. Mut. L. Ins. Co., 131 Mass. 294; Crosby v. Stephan, 32 Hun (N. Y.), 478.

⁹ Crosby v. Stephan, *supra*.

¹⁰ Leonard v. Clinton, 26 Hun (N. Y.), 288.

¹¹ Smillie v. Quinn, 90 N. Y. 492.

be the assignee of a life policy of her husband, payable to his representatives, she cannot assign it in fraud of her creditors.¹ In Massachusetts, where under the statute² a life policy by the husband for the benefit of his wife, enures to her separate use and that of her children, independently of her husband or his creditors, her interest after her husband's death during her lifetime is attachable, as by the Act the interest goes first to her, which she may transmit to her children, and during her lifetime the children have no interest.³ But in Kentucky, it was held that an insurance in a society of that State for the benefit of the families of the insured was intended by the Act for the whole family, though payable to the wife, and that therefore she held it for the whole family as trustee, freed from her debts.⁴ In Iowa, where all the other heirs united in an assignment of a policy, taken by the husband for his wife who had died, to the insured's son, who subsequently died, and his administrator exchanged the original for a paid-up policy, it was held that the policy money was an asset for the son's debts.⁵ But where the charter empowers the insured, with the consent of the society and of the wife, to change the beneficiary, such change is not considered as a fraud on the wife's creditors, as she had no vested interest in the fund.⁶ In Lower Canada, policies for or indorsed to the wife are exempt from her creditors by the Act of 29 Vict., c. 17.⁷

477. A voidable assignment may be set aside by creditors.⁸ But they should proceed in the regular way, as by a bill in equity; and it was held in New York, that a creditor cannot, on the allegation of fraud, compel an administrator, who was the beneficiary of the insured, to give security in the Surrogate Court.⁹ But in New York, a judgment creditor, after the return of an unsatisfied execution, may bring an action to set aside a fraudulent assignment, after a general assignment.¹⁰ In New York, a creditor could not attack an assignment of a wife's policy taken under the Act of 1840, on the ground that it was not assignable.¹¹ In Pennsylvania, where A.,

¹ *Leonard v. Clinton*, 26 Hun (N. Y.), 288.

² Gen. Sta., c. 58, s. 62.

³ *Norris v. Mass. Mut. L. Ins. Co.*, 131 Mass. 294.

⁴ *Schillinger v. Boes*, 85 Ky. 357.

⁵ *Murray v. Wells*, 53 Iowa, 256.

⁶ *Schillinger v. Boes*, *supra*.

⁷ *Vilbon v. Marsouin*, 18 L. Can. J. 249.

⁸ *McCord v. Noyes*, 3 Bradf. (N. Y.)

139.

⁹ *Ib.*

¹⁰ *Leonard v. Clinton*, 26 Hun (N. Y.), 288.

¹¹ *Smillie v. Quinn*, 90 N. Y. 492.

who had taken out a policy payable to his wife, on becoming insolvent induced her by coercion to assign it to B. for an antecedent debt, and B. was active in getting other creditors to sign a compromise, without mentioning anything about the policy, it was held, in a contest between A.'s widow and B. for the policy, that B.'s concealment was immaterial, in the absence of other creditors attacking the assignment.¹

478. If the policy is in excess of what the statute allows, this could not be set up by the insurer as being in fraud of creditors.² Nor could the husband's administrator set it up.³ Fraud must be averred and proved in order to set aside the assignment of a policy,⁴ and it has been held that a voluntary assignment by an insolvent is *ipso facto* fraudulent as to his creditors.⁵ Where a creditor files a bill to get the avails of a policy which has been kept up in fraud as to him, he may show circumstantially who paid the premium, without showing how the debtor derived the money therefor.⁶

479. By the Statute of Elizabeth and similar Acts, a preference in favor of special creditors is not void.⁷ And a life insurance policy may, therefore, be assigned *bona fide* to secure the debt.⁸ But where the insured was indebted as executor to his deceased father's estate, which had been bequeathed to the insured and his wife, who had bequeathed her share to their child, it was held the child was not a direct creditor of her father.⁹ And where there was an assignment of a life policy by a debtor to a creditor as security, by which the creditor was constituted, after payment of the debt, a trustee for A., it was held that the trust was void as regarded other persons who were creditors at the time and up to the death of the insured, though otherwise good.¹⁰ In Ontario, an assignment with intent to give a preference to a creditor by an insolvent is void

¹ McCutcheon's Ap., 99 Pa. St. 133.

² Smith v. Mo. Val. L. Ins. Co., 4 Dill. 353 (D. Kan.).

³ Goodrich v. Treat, 7 Ins. L. J. 269 (Colo.).

⁴ See Chapman v. McIlwrath, 77 Mo. 38; Mut. L. Ins. Co. v. Sandfelder, 9 Mo. Ap. 285; McCutcheon's Ap., 99 Pa. St. 133; Central Bk. v. Hume, 128 U. S. 195.

⁵ Catchings v. Manlove, 39 Miss. 655; Elliott's Ap. 75.

⁶ Fearn v. Ward, 80 Ala. 555.

⁷ Stokes v. Coffey, 8 Bush (Ky.), 533; Ivey v. Knox, 8 Ont. R. 635.

⁸ Fearn v. Ward, 80 Ala. 555; Richardson's Succession, 14 La. An. 1.

⁹ Fearn v. Ward, 80 Ala. 555.

¹⁰ Magawley's Trust, 5 DeG. & S. 1.

by the statute;¹ but the intent to give a preference must be the mainspring in the assignment, for if there is pressure brought to bear upon the assignor, and the assignment is the direct result of the pressure, it is held not to be within the Act. Thus, for example, if the design of the debtor was to avoid a criminal prosecution, or some act which might be damaging to his business or reputation, that would not be an intent to defraud, and though there might be an actual preference, yet it would not be an intent to prefer. And to bring the assignment to prefer within the Act it must be voluntary and not coerced.² The assignment is governed by the laws of the place where it is made.³

DIVISION V.—FRAUD BY THE INSURER ON THIRD PARTIES.

480. In New York, statutes have been passed avoiding fraudulent transfers or preferences by companies, which is rather beyond the scope of this work.⁴ It may, however, be stated that it has been held in Missouri, in an action by a receiver to set aside an *ultra vires* transaction of the company that a corporation is liable for *ultra vires* torts, whatever may be the rule as to *ultra vires* contracts.⁵

DIVISION VI.—FRAUD OF THIRD PARTIES ON THE INSURER.

481. Where the insurer set up as a defence in a suit by his agent, that he had misrepresented the amount of his previous business, the fact that the insurer had gone over his books with him was considered as evidence that he had relied on them and not on his agent's statements.⁶

¹ P. S. Ont., c. 118, s. 2. See *Prentice v. Steele*, 4 L. R. Sup. Ct. (Mont.) 319.

² *Ivey v. Knox*, 8 Ont. R. 635.

³ *Keller v. New Eng. Mut. L. Ins. Co.*, 14 Ins. L. J. 310 (N. Y.); *Prentice v. Steele*, 4 L. R. Sup. Ct. (Montreal), 319. See *supra*, § 333.

⁴ See, however, *Sands v. Hill*, 55 N. Y. 18; *Furniss v. Sherwood*, 3 Sand. (N. Y.) 521; *Holbrook v. Bassett*, 5 Bos. (N. Y.) 147.

⁵ *Alexander v. Relfe*, 74 Mo. 495.

⁶ *Barker v. Knickerbocker Life Ins. Co.*, 24 Wisc. 630.

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482. The contract of insurance may also be avoided because its formation or performance transgresses some rule of public policy of the common law, or because forbidden by statute. Where an individual policy embracing several objects, some of which are used in carrying on a legal business and others not, though all are used for one general business, it has been held that it is indivisible, and the whole contract is avoided.¹ And if the policy is founded on some illegality in which only one of the owners of the subject insured participated, so as to render it bad in part, it is bad altogether.² But it has been held that if a by-law of the insurance company, which is made part of the contract or a condition of the policy, is valid in part and void in part, the whole contract will not be avoided.³

The effect of illegality existing at the inception of the contract is different from that which results from a subsequently occurring illegality which ceases before the loss; in the latter case the policy will be upheld, though not in the former.⁴ Where an illegal act of a third party, which ultimately causes the loss, occurs during the term

¹ *Cunard v. Hyde*, 2 E. & E. 1; ² *Amesbury v. Bowditch Mut. F. Ins. Co.*, 6 Gray (Mass.), 596.
Johnson v. Un. M. & F. Ins. Co., 127 Mass. 555.

⁴ *Hinckley v. Germania F. Ins. Co.*,

³ *Clark v. Protec'n Ins. Co.*, 1 Story, 140 Mass. 38.
 109 (D. Mass.).

of the policy, but the result of it, or the loss occurs afterwards, the insurer is not liable. Thus, in *Lockyer v. Offley*,¹ where a ship was insured for a voyage, the underwriter is not liable for any loss arising after she has been in port for twenty-four hours, though such damage or loss was in consequence of an act of smuggling committed by the master during the voyage; 'for the insurer cannot be held after the time mentioned in the policy; if this were not the rule, the insurer might be liable for a year or so afterwards; and it was likened to a case of a life policy which was for a year, and a mortal wound was given during the term but the death occurred after the year had passed. A contract of insurance which is legal when made, but its performance is rendered illegal by a subsequent statute, is not binding on either party, and the insured loses his indemnity and the insurer his premium, though the premium has attached.'²

Where the illegal contract has been fully executed and money paid thereunder into the hands of a mere depository, who holds it for the use of one of the parties to the contract, to be paid to him, it has been held that an action may be brought to recover the money, provided the recovery does not necessitate the enforcement of any of the unexecuted provisions of the illegal contract.³ If the contract is illegal, the presence of a seal does not prevent an inquiry into the illegality of the consideration.⁴ Evidence of a custom to do an illegal act is inadmissible.⁵ Having made these preliminary remarks we shall consider the question in detail.

483. The subject-matter insured must not exist in violation of law. It has been held in Michigan, that a policy against loss to liquors illegally kept for sale is valid, because the insurance was not against the consequences of the illegal acts, but against accidents to the thing illegally kept.⁶ But it has been held in New England, that such a policy is void.⁷ In Mississippi, such an insurance was

¹ 1 T. R. 252.

⁶ *Niagara F. Ins. Co. v. De Graff*, 12

² *Odlin v. Ins. Co.*, 2 Wash. 312; *Gray v. Bethel*, 3 Ib. 276. Mich. 124. See also *People's Ins. Co. v. Spencer*, 53 Pa. St. 353.

³ *Woodworth v. Bennett*, 43 N. Y. 273.

⁷ *Kelly v. Worcester Mut. F. Ins. Co.*, 97 Mass. 284; *Johnson v. Un. M. & F. Ins. Co.*, 127 Ib. 555; *Lawrence v.*

⁴ *Gray v. Hook*, 4 N. Y. 449.

Nat. F. Ins. Co., 127 Ib. 557; *Carrigan v. Lycoming F. Ins. Co.*, 53 Vt. 418.

⁵ *Mercan. Mut. Ins. Co. v. Hope Ins. Co.*, 8 Mo. Ap. 408. See also *Hutchinson v. State Invest., Etc., Co.*, 53 Cal. 622.

held void on the peculiar wording of the statute as to liquors, which enacted that "all contracts made with any person who shall violate this Act, in reference to the business carried on in disregard of this law, shall be null and void so far only as such person may base any claim upon them, and no suit shall be maintained in favor of such person on any such contract," the Court holding that the insurance was in reference to the business of the unlicensed dealer.¹ Where, however, the liquor was not the principal object of the business, but an incident, as where the insured was a druggist, and only a small part of his stock was liquor, and nothing appeared otherwise illegal, it was held the contract was valid, and it would be for the jury to say whether insurance was collateral to, or in aid of, a violation of the law.² Where the license to sell the commodity insured was not issued at the taking of the policy, though shortly afterwards the insured applied for one, the policy was held void.³ But where the insured, who had a license at the issue of the policy, went on illegally selling after his license had expired, but before the expiration of the policy he procured a license, the temporary illegal use was not held to avoid.⁴

484. In England, and now probably generally, slaves are not the subject of insurance.⁵ Contracts of insurance in restraint of marriage and insurance by way of marriage contracts are illegal.⁶ The insurance of lottery tickets has been held against public policy.⁷ But in *Boardman v. Merrimack Mut. F. Ins. Co.*,⁸ it was held that the consent of the insured to the drawing of a lottery in a building insured as a "shoe manufactory" did not avoid the policy, as the house was not forfeited for the offence, though the owner may be punished, and the fire was not the result of or connected with the lottery; but if the suit were for the rent of rooms or such like, so that the contract was connected with the illegal object, a different result might be reached. It has been held that the holder of a note for money

¹ *Pollard v. Phoenix Ins. Co.*, 63 Miss. 244.

⁵ *Webster v. De Tastet*, 7 T. R. 157.

² *Carrigan v. Lycorn. F. Ins. Co.*, 53 Vt. 418.

⁶ See *White v. Equit. Nuptial Benef.*

Un., 76 Ala. 251; *Chalfont v. Payton*, 91 Ind. 262; *State v. Towle*, 80 Me.

³ *Johnson v. Un. Mut. F. Ins. Co.*, 287.

127 Mass. 555; *Lawrence v. Nat. F. Ins. Co.*, 127 Ib. 557.

⁷ *Mount v. Waite*, 7 John. (N. Y.) 434.

⁴ *Hinckley v. Germania F. Ins. Co.*, 140 Ib. 38.

⁸ 8 Cush. (Mass.) 533.

won at play has not an insurable interest in the life of the maker of the note.¹

The support of an illegitimate child has been considered as a good and legal consideration for the assignment of a life policy by the father to the child's mother.²

Policies on profits are valid.³ And an open policy on future material productions, as grain to be grown by the insured in the course of his business, is legal, though the grain be raised on land acquired after the date of the policy.⁴ A life insurance contract is valid.⁵

By the Act of 19 G. II., c. 37, every reinsurance in England by British or foreign subjects, on foreign as well as on domestic ships, was void unless the reinsured or assurer be bankrupt, insolvent, or die.⁶ And this prohibition continued in force as late as 1864.⁷ In the United States, reinsurance is rarely prohibited.⁸ In Maryland, however, where the fourth section of 19 G. II., c. 37, was in force, the Court held it to apply exclusively to marine policies, as shown by the context in the English Act, though the Court admitted that the fourth section, standing alone, was broad enough to cover all kinds.⁹

485. It has been held that the assignee of a life policy who feloniously causes the death of the insured cannot recover.¹⁰ And it has been held that no recovery can be had upon a policy of life insurance where death results from the insured having voluntarily submitted herself to an abortion without any justifiable medical reason.¹¹ In *Cleaver v. Mut. Reserve Fund L. Ass'n*,¹² there was a policy on the insured's life for his wife, under the English Married

¹ *Dwyer v. Edie*, Park on Insurance, 432.

² *Brown v. Mansur*, 2 New Eng. R. 857 (N. H.).

³ *Eyre v. Glover*, 16 East, 217; *Abbott v. Sebor*, 3 John. Cas. 39.

⁴ *Sawyer v. Dodge Co. Mut. Ins. Co.*, 37 Wis. 503.

⁵ *Lord v. Dall*, 12 Mass. 115.

⁶ *Andree v. Fletcher*, 2 D. & E. 161; *Mackenzie v. Whitworth*, 1 Exch. D. 40.

⁷ *Mackenzie v. Whitworth*, 1 Exch. D. 40. In 1864, by 27 & 28 Vict., c. 56, s. 1, reassurances risks were made lawful, and section 4 of 19 G. II., c. 37,

was repealed by 30 & 31 Vict., c. 23, 1 Ch. D., and also by 30 & 31 Vict., c. 59 (the Statute Law Revision Act, 1867).

⁸ *Hastie v. DePeyster*, 3 Caines (N. Y.), 190; *N. Y. Bowery F. Ins. Co. v. N. Y. F. Ins. Co.*, 17 Wend. (N. Y.) 359; *Merry v. Prince*, 2 Mass. 176.

⁹ *Consolidated Real Estate & F. Ins. Co. v. Cashow*, 41 Md. 59.

¹⁰ *N. Y. Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591.

¹¹ *Hatch v. Mut. L. Ins. Co.*, 120 Mass. 550.

¹² [1892] 1 Q. B. 147 C. A.

Woman's Act of 1882, s. 11, and the wife feloniously caused the death of her husband; it was held, as the trust under the Act became incapable of being carried out, the insurance formed part of the insured's estate; and that the question of public policy could not arise between the insurer and the insured's representatives. It has been held that the assignee in bankruptcy of the insured of a life policy, who was declared a bankrupt the day before his conviction of a capital felony, cannot recover on the policy.¹ But it has been held that the insured may before conviction of a capital felony, though after commission of the felony, assign a policy for a valuable consideration, on a *bonâ fide* sale, which is not for the purpose of avoiding the forfeiture or conviction.² And robbery is a good consideration for an assignment by the robber.³ Where it is sought to avoid a security on the ground that the consideration was the compounding of a crime, it must appear that a crime was committed, and that there was a promise not to prosecute therefor; a mere threat to prosecute, if security be not given, is not sufficient.⁴

486. The contract may be avoided for a usurious transaction; though it is supposed that there is no common law principle against contracting for any rate of interest, and that to make the rate too high or usurious it must come within or be an evasion of the express words of some statute.⁵ The issue, in lieu of a policy for which a note had been given, of a paid-up policy containing a provision that in case interest upon any note given be not paid as agreed upon, the policy shall be forfeited, is not usurious, because, in addition to the maximum per cent. upon the notes, a forfeiture of the policy is also exacted in case the interest is not paid, for the policy is not a contract for the loan of money.⁶ And even if the note had contained the forfeiture clause, it would not have affected the question, for an agreement to pay more than legal interest by way of penalty for not paying the debt is not usurious, because the debtor may pay the debt with lawful interest.⁷ And the purchase of an annuity, which is a mere contingent bargain, at a higher rate than the maximum

¹ *Amicable Soc. v. Bolland*, 4 Bligh, N. R. 194.

² *Chowne v. Baylis*, 31 Beav. 351.

³ *Ib.*

⁴ *Swope v. Jefferson F. Ins. Co.*, 10 Ins. L. J. 891 (Pa.).

⁵ *Earl of Chesterfield v. Janssen*, 1 Atk. 340.

⁶ *Att'y-Gen'l v. N. Amer. L. Ins. Co.*, 82 N. Y. 172.

⁷ *Ib.*

interest allowed, would not be usurious because contingent.¹ The requirement by an insurance company on making a loan that the borrower should insure in the office and deposit the policy as collateral, is not usurious, unless the premium charged may be excessive, for it is contingent.² And the fact that a policy is taken out as one of the conditions of loan is not evidence alone of usury unless bad faith be shown, which the borrower must show, as the company may prefer its policyholders in making loans.³ But in the Federal Courts in Nebraska, however, where the taking the policy was precedent and part of the consideration of a loan, on which the maximum rate of interest was charged, and the loan was to be forfeited by non-payment of the premiums, it was held usurious, on the ground that it was not the case of a mere loan to a policyholder, but the policy was precedent and part of the consideration of the loan, which was to be taken on the borrower's life, or on that of some other person.⁴ And the same rule was adopted by the Federal Court in Iowa.⁵ In Canada, the exceptions in the last clause of 22 Vict., ch. 85, which prevents corporations "heretofore authorized by law to lend, borrow, etc.," at a higher than the legal rate, were held to apply only to corporations organized to lend money or borrow it, or, at least, authorized to do so; but not to all who, by the general law, may so lend it as collateral to their business, and not to apply to a life insurance company which lent money, but made it a condition that all borrowers should insure their lives for double the amount of the loan.⁶

487. With regard to war, the rule is that citizens or subjects of one country cannot trade with those of another at war with the former, without the license of the King, President, or other legal

¹ *Earl of Chesterfield v. Janssen*, 1 *Utica Ins. Co. v. Caldwell*, 3 *Wend. Atk.* 340; *Downes v. Green*, 12 *M. & W.* 481. (N. Y.) 296; *Edinburgh L. Assur. Co. v. Graham*, 19 *U. C. Q. B.* 581.

² *Downes v. Green*, 12 *M. & W.* 481. But see *Tyler v. Mass. L. Ins. Co.*, 13 *See North Brit. Ins. Co. v. Barker*, 6 *Ins. L. J.* 372 (Ill.).

W. & S. Ap. (Scotch), 323.

⁴ *Mo. Val. L. Ins. Co. v. Kittle*, 2

³ *Homœopathic Mut. L. Ins. Co. v. Fed. R.* 113 (D. Neb.).

Crane, 25 *N. J. Eq.* 418; *Wash. L. Ins. Co. v. Paterson Silk Mfg. Co.*, 25 *R.* 805 (D. Iowa).

Ib. 160; *First Nat. Bank v. Continental L. Ins. Co.*, 13 *Ins. L. J.* 510 (Oh.); ⁵ *Nat. L. Ins. Co. v. Harvey*, 7 *Fed.* 19 *U. C. Q. B.* 581.

authority.¹ The fact that one happens to hold the relation of debtor or creditor to another in the hostile country makes no difference.² And even a contract made by the consul of a neutral power with a citizen of a belligerent State that he will protect, with his neutral name from capture by the belligerent, merchandise which the citizen has in the enemy's lines, is void.³ Therefore every insurance on alien property must be understood not to cover property lost during hostilities. For insurance on foreign property will not cover a loss by capture in a war which afterwards takes place between the country of the insurer and that of the insured.⁴ Even though the suit be after the war is over.⁵ Nor could the life of an alien enemy be insured by his creditor, though the latter be the subject of the same country as that of the insurer.⁶ It was held in *Bell v. Gilson*,⁷ that goods purchased in Holland, during the war between Holland and Great Britain, by a British agent resident there, and shipped for British subjects, could be legally insured. But this principle was reversed in *Potts v. Bell*,⁸ where it was held illegal to bring in a neutral ship goods from an enemy's port, purchased by an agent resident in the enemy's country after hostilities had commenced, though not purchased of an enemy. But in *Kershaw v. Kelsey*,⁹ it was held that a lease of a plantation within the Confederate lines during the American Civil War, by a citizen of Massachusetts from a citizen of one of the Confederate States, both parties residing there, was not invalid at law or against the President's proclamation, or in violation of section 5th of chapter 3d of the Act of Congress of

¹ See *The Hoop*, 1 C. Rob. 196; *Ex parte Boussmaker*, 13 Ves. 71; *Potts v. Bell*, 8 T. R. 548; *The Indian Chief*, 3 C. Rob. 22; *U. S. v. Lane*, 8 Wall. 185; *The Rapid*, 8 Cranch, 155; *Conn. v. Penn*, 1 Pet. C. C. (D. Pa.) 496; *Scholefield v. Eichelberger*, 7 Pet. 586; *The Emulous*, 1 Gal. 563 (D. Mass.); *Torre v. Montgomery*, 18 How. 110; *U. S. v. Grossmayer*, 9 Wall. 72; *N. Y. L. Ins. Co. v. Statham*, 93 U. S. 24; *Hamilton v. Mut. L. Ins. Co.*, 9 Blatch. (S. D. N. Y.) 234; *Worthington v. Charter Oak L. Ins. Co.*, 41 Conn. 372; *Leathers v. Commer. Ins. Co.*, 2 Bush (Ky.), 296; *N. Y. L. Ins. Co. v. Clopton*, 7 Ib. 179; *Mut. Benef. L. Ins. Co. v. Hillyard*, 37 N. J. L. 444; *Griswold v. Waddington*, 16 John. (N. Y.) 438.

² *U. S. v. Grossmayer*, 9 Wall. 72.

³ *Coppell v. Hall*, 7 Wall. 542.

⁴ *Ex parte Lee*, 13 Ves. 64; *Bramdon v. Curling*, 4 East, 410; *Brandon v. Nesbitt*, 6 T. R. 23; *Bauduy v. Un. Ins. Co.*, 2 Wash. 391 (D. Pa.).

⁵ *Gamba v. Le Mesurier*, 4 East, 407.

⁶ *Cohen v. N. Y. L. Ins. Co.*, 50 N. Y. 610, 618.

⁷ 1 B. & P. 345.

⁸ 8 T. R. 548.

⁹ 100 Mass. 561.

1861. And it has been held that a contract of insurance by a foreign neutral with a citizen of Virginia, then a belligerent State, is valid.¹ And payments to the agent of the foreign insurer within that State would be valid.² A contract originally unlawful, such as trading in the enemy's lines, cannot be legalized by ratification.³ The provision in a fire policy that no suit should be brought except within twelve months after the loss, and that if any such suit were brought beyond that period the lapse of time should be taken as conclusive evidence against the validity of the claim, does not open and expand like the Statute of Limitations until the disability is removed; but the disability to sue imposed by the war relieves the insured from the consequences of failing to bring suit within the year. Thus, where in January, 1861, a loss occurred in a Confederate State, it was held that such a provision did not prevent the insured from suing on July 30, 1866.⁴ Where a contract is made prior to the war it is not annulled, but only suspended, and revives at the close of hostilities, unless it be of such a nature as to give aid or comfort to the enemy, or is forbidden, or against the policy of the government.⁵

488. But as intercourse between hostile countries is forbidden during a war, it becomes essential to determine the nature of the contract of insurance; for if it be of such a nature as to demand a continuing intercourse during the war it would be avoided by the war; while on the other hand, if it is not, it is merely suspended. Examples of contracts of the former class are contracts of partnership and of affreightment.⁶ It has been apparently held that a fire policy is not annulled by war, though the case is very badly reported.⁷ It has been suggested that a contract of marine insurance or affreightment might be annulled by hostilities,⁸ but there has been

¹ See *Robinson v. Internat. L. Assur. Soc.*, 42 N. Y. 54; *Martine v. Internat. L. Assur. Soc.*, 62 Barb. (N. Y.) 181. L. 444, 261; *Kershaw v. Kelsey*, 100 Mass. 561; *Cohen v. N. Y. Mut. L. Ins. Co.*, 50 N. Y. 610; *Clark v. Morey*, 10 John. (N. Y.) 69; *Bell v. Chapman*, 10 Ib. 183; *Semmes v. Luckett*, 6 Blatch.

² *Martine v. Internat. L. Assur. Soc.*, *supra*. 445 (S. D. N. Y.).

³ *U. S. v. Grossmayer*, 9 Wall. 72. 445 (S. D. N. Y.).
⁴ *Semmes v. Hart. Ins. Co.*, 13 Wall. 158; *Phoenix Ins. Co. v. Underwood*, 12 Heisk. (Tenn.) 424. ⁵ *N. Y. L. Ins. Co. v. Clopton*, 7 Bush (Ky.), 179.

⁶ *Ex parte Boussmaker*, 13 Ves. 71; *Flindt v. Waters*, 15 East, 260; *Mut. Benef. L. Ins. Co. v. Hillyard*, 37 N. J. 442. ⁷ *Mahler v. Phoenix Ins. Co.*, 9 Heisk. (Tenn.) 399.

⁸ *Cohen v. N. Y. Mut. L. Ins. Co.*, 50 N. Y. 610, 619.

a great diversity of opinion as to the contract of life insurance. It was held in Kentucky, Maryland, Mississippi, Missouri, New Jersey, New York, Tennessee, Virginia, and several of the Federal Courts, that the contract of life insurance is not a contract of such continuing performance which is annulled by war, but that it is only suspended. It is a contract for the life of the insured, and not an annual contract renewable yearly by a fresh premium, but the annual premium is merely a condition subsequent; it is of a peculiar nature, executory on the part of the insured, but executed on that of the insurer.¹ In *N. Y. L. Ins. Co. v. Clemmitt*,² during a suit for an adjustment, proceeding on the basis that all the premiums had been paid with interest, the insured died, and it was held that the insured is entitled to back dividends just as though he had paid annually, for the delay was caused by the company's own act in declining originally the insured's tender. And it has also been held that an incorporated life company organized on the mutual plan is not a partnership, so as to be brought within one of the disabilities of war.³ In the Supreme Court of the United States, a somewhat curious rule was laid down by the majority of the Court (Miller, Field, Bradley, Swayne, and Davis, JJ.) in *N. Y. L. Ins. Co. v. Statham*.⁴ It was held that the contract was not a yearly contract with the right to renew, but an entire contract subject to discontinuance for failure to pay the premiums; that the failure to pay the premiums avoided the contract; and that it would be unjust to the insurer to revive it by a tender after the war, as the business of life insurance is based on prompt payments and on

¹ *N. Y. L. Ins. Co. v. Clopton*, 7 Bush (Ky.), 179, disapproving a dictum to the contrary in *Leathers v. Commercial Ins. Co.*, 2 Ib. 296; *Statham v. N. Y. L. Ins. Co.*, 45 Miss. 581; *Smith v. Charter Oak L. Ins. Co.*, 5 Big. L. & Ac. Cas. 412 (Mo.); *Mut. Benef. L. Ins. Co. v. Hillyard*, 37 N. J. L. 444; *Cohen v. N. Y. Mut. L. Ins. Co.*, 50 N. Y. 610; *Sands v. N. Y. L. Ins. Co.*, 50 N. Y. 626; *Crawford v. Ætna Ins. Co.*, 6 Ins. L. J. 685 (Tenn.); *Manhattan L. Ins. Co. v. Warwick*, 20 Grat. (Va.) 614; *Lynchburg Hose F. Ins. Co. v. Knox*, cited in *May on Insur-*

ance, sec. 41; *N. Y. L. Ins. Co. v. Hendren*, 24 Grat. (Va.) 536; *Mut. Benef. L. Ins. Co. v. Atwood*, 24 Ib. 497; *Conn. Mut. L. Ins. Co. v. Duereson*, 28 Ib. 630; *N. Y. L. Ins. Co. v. Clemmitt*, 77 Va. 366; *Hancock v. N. Y. L. Ins. Co.*, 4 Big. L. & Ac. Cas. 488 (E. D. Va.); *Hamilton v. Mut. L. Ins. Co.*, 9 Blatch 234 (S. D. N. Y.).

² *N. Y. L. Ins. Co. v. Clemmitt*, 77 Va. 366.

³ *Mut. Ben. L. Ins. Co. v. Hillyard*, 37 N. J. L. 444; *Cohen v. N. Y. Mut. L. Ins. Co.*, 50 N. Y. 610.

⁴ 93 U. S. 24.

certain laws of average of mortality which a revival would disturb; but at the same time that it would be inequitable that the insured should have no relief at all, and therefore that he was entitled to an artificial equitable value of the policy arising from the value of the premiums paid, and which was the difference between the cost of a new policy and the present value of the premiums yet to be paid on the forfeited policy when the forfeiture occurred. From this judgment the Chief Justice Waite, and Strong, J., dissented, on the ground that the annual payment of the premium was a condition precedent to the life of the policy, and that a failure to pay owing to the war was no excuse; and Clifford and Hunt, JJ., dissented, on the ground that the contract was only suspended by the war, and revived when peace ensued. A similar conclusion as to damage was apparently reached in Tennessee.¹

489. It may be remarked that in most, if not all, of the cases decided by the above tribunals the insured had either made a tender which the company's agent had declined, or that a tender had been prevented by the company removing their agent during the progress of the civil war. The question therefore was suggested as to whether a principal could maintain an agent within the belligerent territory during the hostilities. In *Ins. Co. v. Davis*,² in the Supreme Court of the United States, the Court observed that an agency of the creditor may exist in the belligerent community, provided the purpose is not to transmit the funds so received across the lines, and the principal knows of or recognizes it. But the mere fact that the agency existed prior to the war is not enough to continue it, and the agent must consent to act after the commencement of the war. It has been frequently held that the relation of principal and agent was not severed by the late civil war, though the principal was a citizen of the United States, and the agent of one of the Confederate States.³ Nor is the agency of an alien friend or enemy residing in belligerent territory revoked by war.⁴ In *Ins. Co. v. Davis*,⁵ the policy

¹ *Crawford v. Ætna Ins. Co.*, 6 Ins. L. J. 685 (Tenn.).

² 95 U. S. 425.

³ *N. Y. L. Ins. Co. v. Clopton*, 7 Bush (Ky.), 179; *Statham v. N. Y. L. Ins. Co.*, 45 Miss. 581; *Smith v. Charter Oak L. Ins. Co.* 5 Big. L. & Ac. Cas.

212 (Mo.); *Sands v. N. Y. L. Ins. Co.*, 50 N. Y. 626. See *U. S. v. Grossmayer*, 9 Wall. 72.

⁴ See *Robinson v. Internat. L. Assur. Soc.*, 42 N. Y., 54; *Denniston v. Imbrie*, 3 Wash. 396 (D. Pa.).

⁵ 95 U. S. 425.

provided that premiums should be paid at the company's domicile, and that all receipts for premiums paid at agencies were to be signed by the president or actuary. On a tender by a Virginian during the late civil war to an alleged agent in Virginia, the latter said he had received no renewal receipts from the company, and that without them he could not receive the premium, and that the money if received would be liable to confiscation by the Confederate government. The evidence failed to show that the company had consented to his continuing to act as agent during the war, or that he did so continue and it was held, waiving the consideration of any question in regard to the validity of an insurance on the life of an alien enemy, that such a tender of payment did not bind the company. In *Manhattan L. Ins. Co. v. Warwick*,¹ one of the factors of the decision was the fact that the Foreign Companies' Act required foreign insurers to keep an agent in Virginia, as a prerequisite to doing business within that State, and that therefore a Virginian was entitled to rely upon the continuance of such agency during the life of the policy. In Connecticut, Georgia, and the Federal Court in Tennessee, it was decided that policies made before the war, but on which premiums were not paid owing to the war, were forfeited, as the payment was precedent to any liability, and a tender after the war was too late.² And in these cases it was held that the war revoked the agencies.³

490. As no contract is valid which aids the resources of the enemy, the point has been taken as to whether there is a difference between an insurance prior to the war, on the life or property of one who subsequently becomes an active enemy, and one who is favorably disposed to the home country. In *Mrs. Alexander's Cotton*,⁴ it was held that the personal disposition of one residing in one of the Confederate States in a state of insurrection cannot be inquired into, and all are to be regarded as enemies, and their property liable to seizure. Though in *Hamilton v. Mut. L. Ins. Co.*,⁵ and *Sands v. N. Y. L. Ins. Co.*,⁶ there are dicta to the effect that such

¹ 20 Grat. (Va.) 614.

³ *Ib.*

² *Worthington v. Charter Oak L. Ins. Co.*, 41 Conn. 372; *Dillard v. Manhattan L. Ins. Co.*, 44 Ga. 119; *Tait v. N. Y. L. Ins. Co.*, 1 Flap. 288 (W. D. Tenn.).

⁴ 2 Wall. 404.

⁵ 9 Blatch. 234 (S. D. N. Y.).

⁶ 50 N. Y. 626.

distinction would be a factor in a decision of a case. While in *Smith v. Charter Oak L. Ins. Co.*,¹ it was held to be material that the insured entered the hostile army after his tender of premium had been refused by the insurer's agent.

491. With regard to abatement of interest. It has been held, if an alien enemy has an agent in the United States, and this is known to the debtor, interest ought not to abate during the war,² though if the debtor resided in a hostile territory interest abates.³ In New York, and New Jersey, the Court said interest on life premiums should be tendered at the close of the war.⁴ The Virginia Act of April 2, 1873, so far as it confers on Judges and juries the right to remit interest on certain contracts made prior to April 10, 1865, is unconstitutional.⁵

492. To create belligerent rights, it is not necessary that there should be war between separate and independent powers, but, as the reader has seen, they may exist between parties to a civil war,⁶ and a state of war may exist without any formal declaration of it by either side.⁷ As a civil war is rarely publicly proclaimed, *eo nomine*, against the insurgents, the Courts must take cognizance of it when it actually exists as a fact in domestic history.⁸ A civil war may be said to exist whenever the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts cannot be held.⁹ Therefore the proclamation of the President, during the late American Civil War, was probably not necessary to avoid or suspend contracts after the war actually existed.¹⁰ Though in *Leathers v. Commercial Ins. Co.*,¹¹ it was held that the President of the United States can only issue a proclamation interdicting intercourse by legislative authority, and commercial intercourse was not forbidden

¹ 5 Big. L. & Ac. Cas. 212 (Mo.).

² *Denniston v. Imbrie*, 3 Wash. 396 (D. Pa.); *Roberts v. Cocke*, 28 Grat. (Va.) 207.

³ *Roberts v. Cocke*, *supra*.

⁴ *Sands v. N. Y. L. Ins. Co.*, 50 N. Y. 626; *Mut. Benef. L. Ins. Co. v. Hillyard*, 37 N. J. L. 444.

⁵ *Roberts v. Cocke*, *supra*; *Conn. Mut. L. Ins. Co. v. Duerson*, 28 Grat. (Va.) 630.

⁶ *Robinson v. Internat. F. Assur.*

Soc., 42 N. Y. 54; "Prize Cases," 2 Black, 667.

⁷ *Prize Cases*, *supra*.

⁸ *Robinson v. Internat. F. Assur. Soc.*, 42 N. Y. 54.

⁹ *Prize Cases*, *supra*. See also *Swinerton v. Columbian Ins. Co.*, 37 N. Y. 174; *Merch. Ins. Co. v. Edmunds*, 17 Grat. (Va.) 138.

¹⁰ *Crawford v. Ætna L. Ins. Co.*, 6 Ins. L. J. 685 (Tenn.).

¹¹ 2 Bush (Ky.), 296.

by the war before July 13, 1861, when he was authorized by the Act of Congress to do so. After the Act of Congress of July 13, 1861, and the subsequent proclamation of the President forbidding intercourse between the Union and the Confederate States unless with the President's license, it was held that no military authority subordinate to the President could grant license of intercourse.¹

493. It has been held that a contract of insurance made on Sunday, and not subsequently ratified, is void.² A premium note given for a policy made on Sunday may be shown to be void for want of consideration.³ And the declarations made by the agent at the time are evidence against the company.⁴

494. An insurer, like any other party to a contract, may insert in it any condition he pleases which the other party is willing to agree to, unless such conditions be opposed to statute, or offend against a rule of public policy.⁵ Thus the insurer may insert a condition that there shall be a secret initiation prior to membership in a secret society.⁶ He may also insert a clause in the contract prohibiting the assignment of a life policy without his consent.⁷ Though it has been held that a condition forbidding the assignment of the policy after the loss is illegal.⁸ An agreement to cancel at the option of the parties is valid.⁹ A condition that goods held in trust or on commission are to be declared as such, otherwise the policy will not extend to cover such property, is valid.¹⁰ So is a condition that "if incumbrances fall or be executed upon the property insured, reducing the real interest of the insured to a sum equal to or below the amount insured, without the consent of the company, the

¹ *Onachita Cotton*, 6 Wall. 521; *Coppell v. Hall*, 7 Ib. 542.

² *Heller v. Crawford*, 37 Ind. 279.

³ *Ib.*

⁴ *Ib.*

⁵ *Frey v. Germania, L. Ins. Co.*, 56 Mich. 29; *Webb v. Protec. Ins. Co.*, 14 Mo. 3; *Barnes v. Continen. Ins. Co.*, 30 Mo. Ap. 539; *Beadle v. Chenango Co. Mut. Ins. Co.*, 3 Hill (N. Y.) 161.

⁶ *Matkin v. Supreme Lodge*, 18 S. W. 306 (Tex.).

⁷ *Ferree v. Oxford F. & L. Ins., Etc., Co.*, 67 Pa. St. 373; *Nat. Mut. Aid Soc. v. Lupold*, 101 Ib. 111.

⁸ See *Bergson v. Builders' Ins. Co.*, 38 Cal. 541; *Roger Williams Ins. Co. v. Carrington*, 43 Mich. 252; *West. Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289; *Alkan v. N. H. Ins. Co.*, 53 Wis. 136; *Spare v. Home Mut. Ins. Co.*, 17 Fed. R. 568 (D. Oregon). *Seemable* it is bad in *Courtney v. N. Y. City Ins. Co.*, 28 Barb. (N. Y.) 116. But see contra in *Dey v. Poughkeepsie Mut. Ins. Co.*, 23 Ib. 623.

⁹ *Irwin v. Nat. Ins. Co.*, 2 Dis. (Oh.) 68; *Akers v. Hite*, 94 Pa. St. 394.

¹⁰ *Balto. F. Ins. Co. v. Loney*, 20 Md. 20.

policy shall be void."¹ A condition against total or partial change of title or alienation of the interest insured without the company's consent, is valid.² A stipulation in the contract limiting the number of pounds of gunpowder to be kept on the premises insured, unless the company should be notified and a special rate paid, is reasonable.³ So is a condition that if the premises insured "be damaged or destroyed by the bursting of a boiler or by explosion from any cause, this policy shall be null and void the instant the casualty by explosion occurs."⁴ A clause is valid which provides that the "company will not be answerable for loss or damage by fire occasioned by earthquakes or hurricanes, or by burning of forests; and this policy remains suspended and of no effect in respect of any loss or damage (however caused) which shall happen or arise during the existence of any of the contingencies aforesaid."⁵ So is a clause against a change of habits so as to increase the risk.⁶ The insurer may stipulate that the policy shall be avoided in case the insured die by reason of intemperance.⁷ Or while engaged in the known violation of law.⁸ It is competent to stipulate for a forfeiture of the policy in case of a suicide of the life while sane or insane.⁹ But a clause that "in case of the self-destruction of the policyholder of this policy, whether voluntary or involuntary, sane or insane, . . . this policy shall be void," is unlawful in Missouri, by statute.¹⁰ A clause that insanity shall not in any event prevent the operation of a forfeiture is valid.¹¹ It is not unusual for companies to agree in the contract to pay in the event of suicide the representatives of the

¹ *Nassauer v. Susquehanna Mut. F. Ins. Co.*, 109 Pa. St. 507. See *Olney v. German Ins. Co.*, 88 Mich. 94.

² *Grace v. Amer. Cent. Ins. Co.*, 109 U. S. 278; *Adams v. Mfr's & Builders' F. Ins. Co.* 17 Fed. R. 630 (D. R. I.).

³ *McEwan v. Guthridge*, 13 Moore P. C. C. 304.

⁴ *Waldeck v. Springfield F. & M. Ins. Co.*, 56 Wis. 96.

⁵ *Commer. Un. Assur. Co. v. Can. Iron Mining, Etc., Co.*, 18 L. Can. J. 80.

⁶ *Boyce v. Phoenix Ins. Co.*, 9 Can. L. N. 406.

⁷ *Bloom v. Franklin L. Ins. Co.*, 97 Ind. 478.

⁸ *Ib.*

⁹ *Supreme Commandery, Etc., v. Ainsworth*, 71 Ala. 436; *Adkins v. Columbia L. Ins. Co.*, 70 Mo. 27; *De Gogorza v. Knickerbocker L. Ins. Co.*, 65 N. Y. 232; *Chapman v. Republic L. Ins. Co.*, 6 Biss. 238 (N. D. Ill.); *Knights' Templars, Etc., Co. v. Berry*, 50 Fed. R. 511 (8th Cir. Ap.).

¹⁰ *Berry v. Knights' Templars, Etc., Co.*, 46 Fed. R. 439 (W. D. Mo.).

¹¹ *Blackstone v. Standard L. & Acc. Ins. Co.*, 74 Mich. 592.

insured a certain amount, as the value of the premiums paid;¹ or "a reserve sum" not defined in the policy, but presumably ascertainable;² or the net value,³ or the sum insured, or premiums, as the equities of the case should call for the judgment of the company;⁴ or allowing the directors in their option to pay a loss.⁵ And in this last case the Court said such a clause as the last does not offer any inducement to suicide.⁶ A condition avoiding the policy in the event of additional insurance by the insured, unless notified to the company and by it permitted, is valid.⁷ So is a clause of forfeiture for other insurance, whether valid or invalid.⁸

495. The insurer may stipulate that the insurance shall not attach till the premium is paid,⁹ or till the policy be delivered.¹⁰ A condition forfeiting the policy for non-payment of premiums or assessments is valid.¹¹ So is a condition that if sixty days elapse after maturity of the note and suit be commenced for its collection it shall be considered cancelled.¹² A clause that "all premium notes which have expired and are not in force at the time such assessment is declared, shall nevertheless be liable to assessment for all unpaid losses which existed at the time of the expiration of such premium note or notes, *pro rata*, with all other premium notes then in force," is valid.¹³ So is a clause that the whole note shall be considered as earned on the failure to pay an instalment.¹⁴ Or that a failure to pay an instalment shall make the whole note due, except in the event of a settlement by the insured "for time expired as per terms

¹ *Salentine v. Mut. Ben. L. Ins. Co.*, 513; *Sugg v. Hartford F. Ins. Co.*, 98 24 Fed. R. 159 (E. D. Wis.). N. C. 143. Though see *Gee v. Cheshire*

² *Frey v. Germania L. Ins. Co.*, 56 Mut. F. Ins. Co., 55 N. H. 65. Mich. 29. ³ *Watrous v. Miss. Val. Ins. Co.*, 35

⁴ *Schmidt v. Home L. Ins. Co.*, 8 Ins. Iowa, 582; *Flint v. Oh. Ins. Co.*, 8 Oh. L. J. 77 (Oh.). 501.

⁵ *Salentine v. Mut. Ben. L. Ins. Co.*, ¹⁰ *Flint v. Oh. Ins. Co.*, *supra*.

24 Fed. R. 159 (E. D. Wis.). ¹¹ *People v. Knickerbocker L. Ins. Co.*, 103 N. Y. 480; *Beadle v. Chenango Co. Mut. Ins. Co.* 3 Hill (N. Y.), 161.

⁶ *Moore v. Woolsey*, 4 E. & B. 243.

⁷ *Ib.*

⁸ *Hygum v. Aetna Ins. Co.*, 11 Iowa 21; *Barnard v. Nat. F. Ins. Co.*, 27 Mo. Ap. 26; *Gilbert v. Phoenix Ins. Co.*, 36

Barb. (N. Y.) 372; *N. O. Ins. Ass'n v. Griffin*, 66 Tex. 232; *Fuller v. Madison Mut. Ins. Co.*, 36 Wis. 599. ¹² *Shakey v. Hawkeye Ins. Co.*, 44 Iowa, 540.

¹³ *Susquehanna Mut. F. Ins. Co.'s Ap.*, 105 Pa. St. 615. ¹⁴ *Williams v. Albany City Ins. Co.*, 19 Mich. 451; *Amer. Ins. Co. v. Klink*, 65 Mo. 78.

⁹ *Phoenix Ins. Co. v. Lamar*, 106 Ind.

in short rates."¹ Or a condition suspending the contract of insurance during default on payment of the premium.² Or a condition that a policy shall be forfeited for failure to pay interest on the note given for the premium.³ Or a condition that no claim shall bear interest before a judicial demand.⁴

496. Of late years it has been not unusual for insurance companies to insert in the application or policy a clause to the effect that "every insurance agent, broker, or other person forwarding applications or receiving premiums is the agent of the applicant, and not of the company;" or "that the person forwarding applications shall be deemed the agent of the applicant and not of the company, in any preliminaries to such contract or proposal;" or that "any person, other than the insured, who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company under any circumstances, or in any transaction relating to this insurance;" or that "all agents are to be considered the agents of the applicants so far as relates to making application, and that the company should not be bound by any statement made to the agent not contained in the application." The validity and construction of these conditions have been so frequently before the Courts, that we shall examine the cases applicable to agents acting for both parties somewhat in detail. And while the cases in which these particular clauses appear certainly conflict.⁵ It still may be possible to extract from them some rule. The examination of the cases may be prefaced with the statement that these clauses have generally been looked upon with great disfavor, and, when held valid, very strictly construed, and the state of the law on this point may, perhaps, be best arrived at by a process of exclusion.

¹ *Palmer v. Continen. Ins. Co.*, 31 Mo. Ap. 467. *Joliffe v. Madison Mut. Ins. Co.*, 39 Wis. 111.

² See *Mich. Mut. L. Ins. Co. v. Custer*, 128 Ind. 25; *Blackerby v. Continen. Ins. Co.*, 83 Ky. 574; *Robinson v. Continen. Ins. Co.*, 76 Mich. 641; *Barnes v. Continental Ins. Co.*, 30 Mo. Ap. 539; *Phoenix Ins. Co. v. Batchelder*, 32 Neb. 490; *Blanchard v. Atlan. Mut. F. Ins. Co.*, 33 N. H. 9; *Fogle v. Lycom. Mut. Ins. Co.*, 3 Grant (Pa.), 77; *Knickerbocker L. Ins. Co. v. Dietz*, 52 Md. 16; *Fowler v. Metropol. L. Ins. Co.*, 116 N. Y. 389. Though see *Cole v. Knickerbocker L. Ins. Co.*, 63 How. Pr. (N. Y.) 442.

³ *Merch. Mut. Ins. Co. v. Lacroix*, 45 Tex. 158.

⁴ See *Remarks of the Court in Bell v. Lycom. F. Ins.*, 19 Hun (N. Y.), 238.

It is proposed first to find out to what cases the Courts have decided that such agency clauses do not apply, and then those in which the clauses have been acted upon.

497. At the common law, as a general rule, an agent of one party cannot act in the same transaction for the other party adversely to his first employer without the knowledge of the former, and if he does such contract is voidable.¹ Thus an agent could not, without express consent, grant an insurance in his own favor.² Of course, a mere employment by the other party in another matter would not be material. For instance, there could be no objection in the insured procuring a policy from an agent of the company who also happens to be the insured's watchman or guard in taking care of his property.³ Now the agent of the company who solicits, fills up at the insurer's dictation, and procures the policy is, in point of fact, undoubtedly the agent of the company, certainly in the absence of a clause to the contrary,⁴ and most of the clauses are aimed to protect the insurer from the errors or fraud of this species of special agent. It has been held, admitting that the "agency clauses" apply and are valid, that they could not be meant to extend to acts subsequent to the procurement and issue of the policy.⁵ And that even where the words of the clause are of very extensive import, as in *White v. Conn. Ins. Co.*,⁶ where the condition was that "any

¹ *Copp v. Lynch*, 26 Solic. Jour. 348; Ap. 165. See *Mut. F. Ins. Co. v. Savings & Ins. Co. v. Manhattan F. Ins. Co.*, 66 Ga. 446; *People's Ins. Co. v. Deale*, 18 Md. 26.

² *White v. Conn. Ins. Co.*, 120 Mass. 330; *Von Wien v. Scot. Un. F. Nat. Ins. Co.*, 32 Alb. L. J. (N. Y.) 488; *Lebanon Ins. Co. v. Hoover*, 18 W. N. C. (Pa.) 223; *Grace v. Amer. Central Ins. Co.*, 109 U. S. 278; *Kehler v. N. O. Ins. Co.*, 14 Ins. L. J. 733 (E. D. Mo.); *Adams v. Manfr's & Builders' Ins. Co.*, 17 Fed. R. 636 (D. R. I.). See also *Whited v. Germania F. Ins. Co.*, 76 N. Y. 415; *Stone v. Franklin F. Ins. Co.*, 105 N. Y. 543; *First Nat. F. Ins. Co. v. Issett*, 11 W. N. C. (Pa.) 558; *Newark F. Ins. Co. v. Sammons*, 110 Ill. 166; *Peoria Sugar Refinery Co. v. Susquehanna Mut. F. Ins. Co.*, 20 Fed. R. 480 (E. D. Pa.).

³ *Pratt v. Dwelling-House Mut. F. Ins. Co.*, 53 Hun (N. Y.), 101; *White v. Lancash. Ins. Co.*, 27 U. C. Ch. 61. See *Glen's Falls Ins. Co. v. Hopkins*, 16 Brad. (Ill.) 220; *Diboll v. Ætna L. Ins. Co.*, 9 Ins. L. J. 827 (La.).

⁴ *Northrup v. Germania F. Ins. Co.*, 48 Wis. 420.

⁵ *Commer. F. Ins. Co. v. Allen*, 80 Ala. 571; *Joy v. Pa. Ins. Co.*, 35 Mo. 6 120 Mass. 330.

person other than the insured, who might have procured the insurance, shall be deemed the agent of the insured, and not of the insurers under any circumstances whatever, or in any transactions connected with the policy.¹ Obviously, whether there is an agency clause or not, if it appear that the agent, in fact, is authorized by the insured to act in subsequent matters for him, as to receive notice of cancellation, the insured would be bound by his act.²

498. In *Sexton v. Montgomery Co. Mut. Ins. Co.*,³ the policy provided that "the insured will be bound by the application, for the purpose of taking which the survivor will be deemed the agent of the applicant as well as of the company," and the Court held that while the insured would be bound by the agent's description and survey, he would not be bound by the agent of the insurer in other respects, and, as the agent was told about prior insurance by the insured, that was notice to the company.

In *Graham v. Ont. Mut. Ins. Co.*,⁴ Cameron, C. J., said that a somewhat similar clause did not apply to acts done in consequence of certain explanations of questions propounded in the policy, which were given by the agent of the insurer. So in *Commercial Ins. Co. v. Ives*,⁵ the clause was held not to apply in any event where the company itself, it was said, suggested or issued the policy, relying on its own knowledge. In *Shannon v. Hastings Mut. F. Ins. Co.*,⁶ in addition to the agency clause, the policy provided that the company was to be responsible for the survey, and it was held the diagram made was a survey. In *Kister v. Lebanon Mut. Ins. Co.*,⁷ the clause "if any broker or other person other than the insured shall have procured this insurance to be taken, such broker or other person shall be considered the agent of the insured and not of the company," was held not to apply to an agent employed by the company. Where the agency clause is present making the agent that of the insured, but the insurer inserts another clause to the effect that the policy shall not be good till countersigned by such agent, it was

¹ So in *Ind. Ins. Co. v. Hartwell*, 100 Ind. 566. But see *Whited v. Germania F. Ins. Co.*, 76 N. Y. 415.

² See *Hart. F. Ins. Co. v. Reynolds*, 36 Mich. 502; *Stone v. Franklin F. Ins. Co.*, 105 N. Y. 543.

³ 9 Barb. (N. Y.) 191.

⁴ 14 Ont. R. 358.

⁵ 56 Ill. 402.

⁶ 26 U. C. C. P. 380; 2 Ont. Ap. 51.

⁷ 128 Pa. St. 553. See also *Andes F. Ins. Co. v. Lohr*, 6 Daly (N. Y.), 105.

held that the latter clause contradicted the former, and therefore would be taken to render it nugatory.¹

499. In no event could the agency clause apply unless expressly or impliedly made known to the insured, and the secret instructions of the company to their agent to consider himself and act as the applicant's agent in regard to the insurance are immaterial.² In *Susquehanna Ins. Co. v. Perrine*,³ the Court, while admitting that the applicant was a stranger in the preliminary negotiations, held that he was bound by the agency clause inserted in the by-laws, on the ground that, as the applicant knew he was about to become a member, it was fair to suppose that he would make himself acquainted with the regulations of the company, one of which was this clause. How far this case is law in Pennsylvania the author of this book is unable to state, but at all events it may be stated that such a clause has subsequently been specifically held not to apply under almost identical circumstances.⁴ For instance, it was held in *Nassauer v. Susquehanna Mut. Ins. Co.*⁵ that the insured was not bound by a provision in a policy referring to a by-law making the agent of the company the insured's agent, on the ground that, being untrue in fact, the insured was not bound by a condition of the company which he had no right reasonably to expect. So in *Boetcher v. Hawkeye Ins. Co.*,⁶ the agency clause in the policy was not enforced, apparently because the policy was not delivered till five days after the contract was completed, which was therefore in force during that time before its delivery, and the insured was not informed of the agency clause till the receipt of the policy. And as he could not then cancel without a loss of money, unless for a fraud or mistake, it would be unreasonable to hold him to a condition in the policy which he was not previously informed would be inserted in it and which he did not expect; and therefore his neglect in not reading the policy was not material. The rule as to the necessity

¹ *N. Brit. & Mercant. Ins. Co. v. Crutchfield*, 108 Ind. 518; *Sprague v. Holland Purchase Ins. Co.*, 69 N. Y. 128; *Whited v. Germania F. Ins. Co.*, 76 Ib. 415.

² *Beebe v. Hart. Co. Mut. F. Ins. Co.*, 25 Conn. 51.

³ 7 W. & S. (Pa.) 348.

⁴ *Eilenberger v. Protective Mut. F. Ins. Co.*, 89 Pa. St. 464; *Nassauer v. Susquehanna Mut. F. Ins. Co.*, 109 Ib. 507.

⁵ 109 Pa. St. 507, 513.

⁶ 47 Iowa, 253. See also *Boetcher v. Hawkeye Ins. Co.*, 47 Iowa, 253; *Nassauer v. Susquehanna Mut. F. Ins. Co.*, 109 Pa. St. 507.

of notice of the provision to the insured would equally apply to mutual and stock companies.¹

500. In many cases the agency clauses have been held inoperative where the insurer's agent, in point of fact, acted as the agent of the insurer.² And certain Courts have held the clauses void,³ at least when intended to apply to a general agent.⁴ In *Atlantic Ins. Co. v. Carlin*⁵ the procurer of the insurance was not the insured, but was in point of fact his agent, and the clause was applied. In cases in Massachusetts, and New York, the agency clause has been enforced, though the agents in the cases were not general agents.⁶ And in Massachusetts, it was also held the clause was not affected by the Act of 1861, c. 170, relating to insurance agents.⁷ In Canada, in *Bleakley v. Niagara Dist. Mut. Ins. Co.*⁸ and *Johnstone v. Ib.*,⁹ the agency clause was enforced, though in these cases, in addition to the words that the agent should be considered the agent of the applicant, there were added "and the company shall not be bound by any statement made to the agent not contained in the application." Apparently, in the Province of Quebec, such a clause would be permitted by the Civil Code Act of 1735.¹⁰ In Maine, under the statute,¹¹ a policy drawn up by an agent who "knows

¹ See *Kausal v. Minn. Farmers' Mut. F. Ins. Assur.*, 31 Minn. 17; though see *Susquehanna Ins. Co. v. Perrine*, 7 W. & S. (Pa.) 348.

² See *Lycom. F. Ins. Co. v. Ward*, 90 Ill. 545; *Ind. Ins. Co. v. Hartwell*, 100 Ind. 566; *Continen. Ins. Co. v. Pearce*, 39 Kan. 396; *Kausal v. Minn. Farmers' Mut. F. Ins. Assur.*, 31 Minn. 17; *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300. See also *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331; *Eilenberger v. Protective Mut. Ins. Co.*, 89 Ib. 464. See also *Benson v. Agric. Ins. Co.*, 42 U. C. Q. B. 282; *Graham v. Ont. Mut. Ins. Co.*, 14 Ont. R. 358.

³ *Sullivan v. Phoenix Ins. Co.*, 34 Kan. 170.

⁴ *N. Brit. & Mercant. Ins. Co. v. Crutchfield*, 108 Ind. 518; *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 108;

Bassell v. Amer. F. Ins. Co., 2 Hughes, 531 (E. D. Va.).

⁵ 58 Md. 336.

⁶ *Abbott v. Shawmut Mut. F. Ins. Co.*, 3 Allen (Mass.), 213; *Shawmut F. Ins. Co. v. Stevens*, 9 Ib. 332; *Mulrey v. Shawmut Mut. F. Ins. Co.*, 4 Ib. 116; *Wood v. Firemen's Ins. Co.*, 126 Mass. 316; *Alexander v. Germania F. Ins. Co.*, 66 N. Y. 464, reversing same case in 2 Hun (N. Y.), 655; *Rohrbach v. Germania F. Ins. Co.*, 62 N. Y. 47; *Partidge v. Commer. F. Ins. Co.*, 17 Hun (N. Y.), 95.

⁷ *Wood v. Firemen's F. Ins. Co.*, 126 Mass. 316.

⁸ 16 U. C. Ch. 198.

⁹ 13 U. C. C. P. 331.

¹⁰ *Conn. F. Ins. Co. v. Kananagh*, 5 L. R. S. C. (Mont.) 262.

¹¹ P. L. 1861, c. 34, s. 2.

all the facts about the ownership and occupancy," binds the company.¹

501. It is not unreasonable to stipulate that proofs of loss shall be presented within fifteen days.² Nor is a condition requiring the proofs to be certified to by the hand and seal of the nearest magistrate unreasonable.³ And a mutual company is not precluded from making such a condition.⁴ The insurer may stipulate that the insured shall, if required, submit to examinations under oath by any person appointed by the insurer and subscribe it when reduced to writing, and that a refusal to answer any such questions or sign such examination shall cause a forfeiture of all claims under the policy.⁵ But a stipulation that the chief of the fire department, magistrate, or justice nearest shall certify as to loss has been thought void, as the insurer has no right to require a public officer to do this act.⁶ A condition that in adjusting a loss other existing policies shall be taken into account even though forfeited, is not unreasonable, its purpose being to protect the insurer against the necessity of contesting with the insured the validity of the other policies.⁷ The insurer may stipulate that an appraisal of the property injured shall precede payment.⁸ Or that the insurer shall have the right on request to have an appraisal of the property insured when injured, and take the whole or any part of the property at the appraised value.⁹ A by-law giving a committee the discretion to determine whether a sick member is entitled to have a benefit is valid.¹⁰ So is a by-law of a railway relief association requiring its members to release the railway company from all claims for damages before applying for relief to the relief association, as it is a mere election from whom to get damages.¹¹

¹ *Caston v. Monmouth M. & F. Ins. Co.*, 54 Me. 170.

² *Bowes v. Nat. Ins. Co.*, 4 P. & B. (N. B.) 437.

³ *Cammell v. Beaver, Etc., Ins. Co.*, 39 U. C. Q. B. 1.; *Morrow v. Waterloo Co. Mut. F. Ins. Co.*, 39 Ib. 441.

⁴ *Langel v. Mut. Ins. Co.*, 17 U. C. Q. B. 524.

⁵ *Gross v. St. Paul F. & M. Ins. Co.*, 14 Ins. L. J. 158 (D. Minn.).

⁶ *Univ. F. Ins. Co. v. Block*, 109 Pa. 535.

⁷ *Liv. & Lond. & Globe Ins. Co. v. Verdier*, 35 Mich. 395.

⁸ *Wolff v. Liv. & Lond. & Globe Ins. Co.*, 50 N. J. L. 453.

⁹ *Hamilton v. Liv. & Lond. & Globe Ins. Co.*, 136 U. S. 242.

¹⁰ *Van Poucke v. Netherland's St. Vincent de Paul Soc.*, 29 N. West R. 862 (Mich.).

¹¹ *Owens v. B. & O. R. R. Co.*, 35 Fed. R. 715 (S. D. Oh.).

502. It was held in Massachusetts, that it was competent for the Legislature to pass a statute which authorized the Court, after a hearing in equity, to ratify and confirm an assessment by a mutual insurance company upon its members who at the time of the making thereof were liable to assessment, and which provided that the decree of the Court notifying the same shall be conclusive upon all such members as to the necessity of the assessment, the authority of the company to make or collect the same, the amount thereof, and all formalities connected therewith, without providing for other notice to such members than by a general one by publication, and without making any special provision for a trial by jury.¹ A condition in a policy of a mutual company that the only action maintainable by the insured on the policy should be a levy of assessments on the policyholders, who were bound to contribute to death losses according to certain provisions, and that the company should merely be bound to pay over what should be assessed and collected, and if a levy should be ordered by the Court that the association should only be liable for the sum collected, was held valid in the Federal Court for the Eastern District of Missouri.² In Pennsylvania, the Act of incorporation of a company provided that the insured should deposit a note in an amount fixed by the directors, of which ten per cent. was to be paid in cash and the rest when the directors should deem advisable. At the expiration of the policy the unpaid portion of the note was to be cancelled, and a lien, waiving inquisition on the property of the insured for the amount due on the note, was also given on the company filing a memorandum containing the name of the insured, the description of the property, the "amount of the note unpaid," etc. It was held that the Statute was not unconstitutional because making the insured agree as to the manner in which judgment should be entered against him, and waiving a jury trial.³

503. An Act of incorporation of a mutual insurance company of New Hampshire, which provided that suit should "be brought at a proper Court in the county of Merrimack," State of New Hampshire,

¹ *Hamilton Mut. Ins. Co. v. Parker*, 11 Allen, 574. See Sts. 1862, c. 181; 1863, c. 249. ² *Krugh v. Lycom. F. Ins. Co.*, 77 Pa. St. 15; *Lycom. F. Ins. Co. v. Buck*, 4 Leg. Gaz. (Pa.) 182.

³ *Eggleston v. Centennial Mut. L. Ass'n*, 19 Fed. R. 201 (E. E. Mo.).

was held inoperative because the remedy was regulated by the law of the forum where the redress is sought.¹ And in Maine, a provision that the insured may sue "at the next Court to be holden in and for the county" where the company is established, was held not to repeal the provision of R. S. c. 81, sec. 6, which authorized the plaintiff to sue in the county where he resides.² So in Massachusetts, the control of the place of the remedy was held not to be a matter of contract, but that the insured must bring his suit in the county provided by the general law.³ These last cases rest simply on reasons of general convenience. It was suggested by Shaw, C. J., that it would be very inexpedient and against public policy to allow the general rules established by law as to the place of bringing suits to be changed by contract, as such contracts might be induced by considerations tending to bring the administration of justice into disrepute; such as the greater or less intelligence and impartiality of Judges, the integrity and capacity of juries, the more or less influence arising from the social and political standing of parties in one or another county, and though that Judge perhaps did not think these reasons sufficient to render the condition void, he avoided the clause on the ground that to require Courts and juries to apply different rules of law to different cases in the conduct of suits, in matters relating to remedy merely, according to the stipulations of the parties framing them, would be of great inconvenience.⁴

504. A clause in a bill of lading giving the carrier the benefit of the shipper's policy of insurance, if he has any, has been held valid.⁵ So is a clause in a policy of insurance that the "insurance shall not enure to the benefit of any carrier."⁶

It is usual for the insurer to stipulate that a suit for breach of the contract on the part of the insurer shall be brought within six months or a year after a cause of action shall accrue, and such a

¹ *Bartlett v. Un. Mut. F. Ins. Co.*, 46 Me. 500.

² *Martin v. Penobscot Mut. F. Ins. Co.*, 53 Me. 419.

³ *Hall v. People's Mut. F. Ins. Co.*, 6 Gray (Mass.), 185; *Nute v. Hamilton Mut. Ins. Co.*, 6 Ib. 174; *Amesbury v. Bowditch Mut. F. Ins. Co.*, 6 Ib. 596.

⁴ See *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray (Mass.), 174. See *post*, § 1287.

⁵ *Mercantile Mut. Ins. Co. v. Calebs*, 20 N. Y. 173; *Ins. Co. of N. A. v. Easton*, 73 Tex. 167; *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312.

⁶ *Ins. Co. of N. A. v. Easton*, 73 Tex. 167.

stipulation is not against public policy.¹ In *French v. Lafayette Ins. Co.*² (1853), the limit of six months was held invalid; but this case cannot be considered as authority in view of the more recent Federal decisions to the contrary, including that of the Supreme Court.³ In North Dakota, the clause is void by the statute.⁴ In Lower Canada, in *Wilson v. State F. Ins. Co.*,⁵ the six months clause was also held invalid, but the reasoning is not persuasive, and there is a later decision the other way in the Supreme Court of

¹ *Woodbury Sav. Bk., Etc. v. Charter Oak F. & M. Ins. Co.*, 31 Con. 517; *Longhurst v. Star Ins. Co.*, 19 Iowa, 364; Ky. Mut. Security Fund Co. v. Turner, 89 Ky. 665; *Ghio v. West. Assur. Co.*, 65 Miss. 532; *Muse v. Land Assur. Corp.*, 108 N. C. 240; *Hocking v. Howard Ins. Co.*, 120 Pa. St. 171; *Everett v. Niag. Ins. Co.*, 142 Pa. St. 322; *Suggs v. Travellers' Ins. Co.*, 71 Tex. 579; Va. F. & M. Ins. Co. v. Wells, 83 Va. 736; *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425; *Rousseau v. La Com d'Ass.*, 1 Montreal S. C. 395; *Allen v. Merch. M. Ins. Co.*, 33 L. Can. J. 51, 314. See also *Yoell v. Manhattan Ins. Co.*, 3 Pac. L. J. 9; in the following cases the limitation was one year, or twelve months: *Garido v. Amer. Central Ins. Co.*, 8 West Coast, 180 (Cal.); *Underwriters, Etc., v. Sutherland*, 55 Ga. 266; *Hekla Ins. Co. v. Schroeder*, 9 Brad. (Ill.) 472; *Peoria M. & F. Ins. Co. v. Whitehill*, 25 Ill. 466; *Carraway v. Merch. Mut. Ins. Co.*, 26 La. An. 298; *Edson v. Merch. Mut. Ins. Co.*, 35 Ib. 353; *Peoria M. & F. Ins. Co. Hall*, 12 Mich. 202; *Glass v. Walker*, 66 Mo. 32; *Tasker v. Kenton Ins. Co.*, 59 N. H. 439; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; *Wilkinson v. First Nat. F. Ins. Co.*, 72 Ib. 499; *Waite v. Spring Garden Ins. Co.*, 1 W. N. C. (Pa.) 155; *Brown v. Roger Williams Ins. Co.*, 5 R. I. 394; *Merch. Mut. Ins. Co. v. Lacroix*, 35 Tex. 249; 45 Ib. 158; *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472; *Cray v. Hart.*

F. Ins. Co., 1 Blatch. 280 (D. Conn.); *Davidson v. Phoenix Ins. Co.*, 4 Saw. 594 (D. Cal.); *O'Laughlin v. Un. Central L. Ins. Co.*, 3 McCrary, 543 (E. D. Mo.); *Thompson v. Phoenix Ins. Co.*, 25 Fed. R. 296 (D. Or.); *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386; *Ketchum v. Protection Ins. Co.*, 1 Allen (N. B.), 136; *Grieve v. Northern Assur. Co.*, 5 Viet. L. R. 443. In the following the limit was six months: *Brown v. Savannah Mut. Ins. Co.*, 24 Ga. 97; *Stout v. City F. Ins. Co.*, 12 Iowa, 371; *Moore v. State Ins. Co.*, 72 Ib. 414; *Roach v. N. Y. & Erie Ins. Co.*, 30 N. Y. 546; *Schroeder v. Keystone Ins. Co.*, 2 Phila. 286; *North-west Ins. Co. v. Phoenix Oil & Candle Co.*, 31 Pa. St. 448; *Universitysal Mut. F. Ins. Co. v. Weiss*, 106 Ib. 20; *Va. F. & M. Ins. Co. v. Aiken*, 82 Va. 424; *McFarland v. Aetna F. & M. Ins. Co.*, 6 W. Va. 437; *McFarland v. Peabody Ins. Co.*, 6 Ib. 425. In *Amesbury v. Bowditch Mut. F. Ins. Co.*, 6 Gray (Mass.), 596, the limit was four months; and in *Keim v. Home Mut. F. & M. Ins. Co.*, 42 Mo. 38, and *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621, it was the next term of Court held after a lapse of sixty days.

² 5 McLean, 461 (D. Ind.). But see *Barnes v. McMurtry*, 29 Neb. 178.

³ See *supra*, note 1.

⁴ *Johnson v. Dak. F. & M. Ins. Co.*, 45 N. W. 799 (N. Dak.).

⁵ 7 L. Can. J. 223.

Canada.¹ In Indiana, the limitation was considered valid, but the statute of the State forbids a limitation for less than three years, and this applies to foreign companies.² In Maine, the limitation in the policy was held bad by reason of a statute³ which provides that "no conditions, restrictions, or stipulations in its charter, by-laws, or policies shall deprive the Courts of this State of jurisdiction of actions against such companies, nor limit the time of commencing them to a period less than two years from the time cause of action occurs."⁴ There is no legal objection to a provision that "no question as to validity of an application or certificate of membership shall be raised, unless such question be raised within the first two years from and after the date of such certificate of membership, and during the life of the member therein named," as it is not an absolute agreement to waive or condone fraud, but is analogous to a short Statute of Limitations.⁵

505. In the Dominion of Canada, there is a statutory policy, but the insurer is allowed to insert any new conditions, or vary the statutory ones, if the Court shall consider such new or varied conditions reasonable, and it is not necessary to raise the reasonableness of the conditions on the trial, but it may be tested in the Divisional Court.⁶ The reasonableness of a condition seems to depend on the circumstances of each case.⁷ Apparently the burden is upon the insurer to show the reasonableness of the policy condition.⁸ Where the statute declares that a misrepresentation must be material to avoid, a policy condition making an immaterial concealment or representation a forfeiture was held unreasonable.⁹ A condition inserted by the company that "when property insured . . . or any part thereof shall be alienated, or in case of any transfer or change of title to the property insured, or any part thereof, or of any interest therein, without the consent of this company indorsed thereon, or

¹ *Allen v. Merch. M. Ins. Co.*, 33 L. Can. J. 51, 314.

² *Ins. Co. of N. A. v. Brim*, 111 Ind. 281; R. S. 1881, sec. 3770.

³ R. S. c. 48, sec. 62.

⁴ *Dolbier v. Agricultural Ins. Co.*, 67 Me. 180.

⁵ *Wright v. Mut. Benef. L. Ass'n*, 118 N. Y. 237.

⁶ *Reddick v. Saugeen Mut. F. Ins. Co.*, 15 Ont. Ap. 363.

⁷ *Ballagh v. Royal Mut. F. Ins. Co.*, 5 Ont. Ap. 87. See *Graham v. Ont. Mut. Ins. Co.*, 14 Ont. R. 358.

⁸ *Smith v. City of Lond. Ins. Co.*, 11 Ont. R. 38.

⁹ *Butler v. Standard F. Ins. Co.*, 4 Ont. Ap. 391; *Reddick v. Saugeen Mut. F. Ins. Co.*, 15 Ont. Ap. 363.

if the property hereby insured shall be levied upon or taken possession or custody under any legal process, or the title be disputed in any proceeding at law or equity, this policy shall cease to be binding," was held unreasonable.¹ A provision that a ten days' vacancy shall forfeit is good.² Where the Dominion Statute forbade the keeping of more than twenty-five pounds of powder without special permission and the payment of an extra premium, the condition of the company that not more than ten should be kept was held reasonable.³ A condition in a policy by a mutual company that "in case any promissory note for a cash premium note . . . given to the company, or any officer or agent thereof, be not paid when due, the policy . . . shall be null and void, and the company shall not be liable for any loss occurring either before or after the maturity of such promissory note," was held an unreasonable condition under R. S. Ont. c. 161. Because, for example, if the note be promissory and negotiable, and in the hands of a transferee, it is too much to ask the insured to see to its payment at maturity; and if the note be for an assessment it is also too severe, for the statutory condition gives thirty days, etc., for payments in such cases.⁴ The legality of the agency clause, as a variation of the statutory conditions, has been doubted.⁵ To require the certificate of the magistrate most contiguous without restriction has been considered an unreasonable condition.⁶ It is reasonable that the insured shall furnish a particular account of the loss, which will enable the company to see what was actually damaged instantly.⁷ The company cannot extend the statutory condition so as not to pay till more than thirty days after the loss, though it could limit it, as the thirty days is a favor to the insurer.⁸

506. Where there is a statute on the subject of insurance for the benefit of the insured, it has been held that he may waive the benefit of its operation, as in the case of any stipulation in a con-

¹ *Sands v. Standard Ins. Co.*, 26 U. Ont. R. 358. Though see *Sowden v. Standard F. Ins. Co.*, 5 Ont. Ap. 290. C. Ch. 113; 27 Ib. 167.

² *Peck v. Agric. Ins. Co.*, 19 Ont. R. 494. ⁶ *Shannon v. Hastings Mut. Ins. Co.*, 2 Ont. Ap. 81. See 26 Vict., c. 44, s. 38.

³ *Parsons v. Queen's Ins. Co.*, 2 Ont. R. 45. ⁷ *Banting v. Niag. Dist. Mut. F. Assur. Co.*, 25 U. C. Q. B. 431.

⁴ *Ballagh v. Royal Mut. F. Ins. Co.*, 5 Ont. Ap. 87. ⁸ *City of Lond. F. Ins. Co. v. Smith*, 15 Duv. (Can.) 69. See *Smith v. City of Lond. F. Ins. Co.*, 11 Ont. R. 38.

⁵ *Graham v. Ont. Mut. Ins. Co.*, 14

tract in his favor.¹ Though there are also cases the other way.² In *Caffery v. John Hancock Mut. Ins. Co.*,³ the statute provided that no policy should thereafter be forfeited for the failure to pay the premium, with a provision that the first premium should constitute a temporary insurance, and further that if the death should occur within the term of the temporary insurance, and the policy was otherwise valid, the company was bound as though no lapse had occurred, "anything in the policy to the contrary notwithstanding;" and the policy stipulated that after one or more premiums shall have been paid this policy shall not become forfeited or void by the non-payment of any subsequent premiums, but shall remain in force for an amount *pro rata* to the number of premiums paid; to wit: for one-twentieth of the amount insured for each and every premium paid. It was held that an agreement to waive the provisions of the statute, and substitute such a non-forfeitable policy, was valid; the words "anything in the policy to the contrary notwithstanding" meant any clause as to forfeiture in ordinary policies, but did not apply where the parties substitute a different form of non-forfeiting policy. In Canada, it was decided that a public statute making a policy void for the presence of double insurance cannot be waived.⁴ Though a statute does not prevent the parties from contracting in regard to additional insurance if not opposed to the statute, as, in such a case, the statute with the provision could apply.⁵ In *Farmers' & Drovers' Ins. Co. v. Curry*,⁶ it was held that a statute providing that "all statements and descriptions in any application for or policy of insurance shall be deemed and held representations and not warranties, nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy," may be waived by agreement, but this was overruled in *Germania Ins. Co. v. Rudwig*,⁷ where it was held that an honest immaterial misrepresentation made a warranty will not avoid.

¹ *Maklem v. Bacon*, 57 Mich. 334. See *Lewis v. Monmouth Mut. F. Ins. Co.*, 52 Me. 492. See also *Tasker v. Kenton Ins. Co.*, 58 N. H. 469.

² See *Fidelity Mut. L. Ass'n v. Ficklin*, 74 Md. 172; *Greene v. Walton*, 59 Hun (N. Y.), 102; *Equit. L. Assur. Soc. v. Clements*, 140 U. S. 226.

³ 27 Fed. R. 25 (E. D. Mich.).

⁴ *Merritt v. Niag. Dist. Mut. F. Ins. Co.*, 18 U. C. Q. B. 529.

⁵ *Butler v. Waterloo Co. Mut. F. Ins. Co.*, 29 U. C. Q. B. 553.

⁶ 13 Bush (Ky.), 312.

⁷ 80 Ky. 223. See *White v. Conn. Mut. L. Ins. Co.*, 4 Dill. 177 (W. D. Mo.).

507. In a lower Court of Indiana it was held that a pooling arrangement among all the insurance agents of a certain city, fixing the rates of insurance on property, is void, as being in restraint of trade, and that the penalty for the violation of the schedule rates agreed upon by them cannot be enforced.¹

508. The insured may assign his interest in a policy to him, his heirs, etc. assigns, to another, reserving the right to redeem during his life on repaying the loan with interest in one year, but in case of his death before redeeming the transfer to be absolute, as this is not a restriction on the power of assignment, and the heirs of the insured have no rights in the policy.²

509. With regard to the return of premiums paid on an illegal insurance, the general rule seems to be that where the inception of the contract is illegal, the law will not aid any of the parties.³ Thus, in *Cousin v. Nantes*,⁴ Lord Mansfield observed that there was no return of the premiums for short interest on a wagering policy on a ship, for it was to the interest of the insured that the ship should be lost. And no return of premiums is had on wagers.⁵ In *Campbell v. Allen*,⁶ in Scotland, restitution of the premium was refused where the policy was void for want of an insurable interest under 14 Geo. III., on the principle *in pari casu melior est conditio possidentis*. But premiums paid by the insured to a lottery office-keeper for insuring lottery tickets may be recovered back, because the parties were not *in pari delictu*, as the penalties are all put by the statute on the officekeeper.⁷ And it has been held where the insurance on lottery tickets is void as against public policy, that the insured could still recover back the premium, as no statute had been violated by him.⁸ It has been held, where the insured is not guilty of a *delictum*, that the premium may be recovered back; as in the case of captors, who effected the policy, and who could not claim for want of interest, and were guilty of no fraud in effecting the policy, and there was nothing illegal in the voyage.⁹ Or where

¹ *Metzger v. Cleveland*, 13 Ins. L. J. 855 (Ind.) Paterson v. Powell, 2 L. J. n. s. (C.P.) 13.

² *Edinton v. Ætna L. Ins. Co.*, 13 Hun (N. Y.), 543.

³ *Allkins v. Jupe*, 2 C. P. D. 375.

⁴ 3 Taunt. 513.

⁵ *Lowry v. Bourdieu*, 2 Dough. 468; 434.

⁶ 12 Fac. Cas. (folio) 353.

⁷ *Jaques v. Golightly*, 2 W. Bl. 1074;

Browning v. Morris, 2 Cowp. 790.

⁸ *Mount v. Waite*, 7 John. (N. Y.)

⁹ *Routh v. Thompson*, 11 East. 427.

a premium was paid in ignorance of hostilities.¹ And where a policy was illegal under 14 Geo. III., c. 48, sec. 2, because the name of the person interested, or on whose account it was made, was not inserted therein as such, as the insured's omission was not a "*delictum*" the maxim "*in pari delictu*" could not apply.² Where the commencement of the risk is legal, but the performance is rendered illegal by a subsequent law, the premium is recoverable.³

¹ Oom. v. Bruce, 12 East, 225. See also Hentig v. Staniforth, 5 M. & S. 122.

² Dowker v. Can. L. Assur. Co., 24 U. C. Q. B. 591.

³ Gray v. Sims, 3 Wash. 276 (D. Pa.)

CHAPTER III.

MISTAKE AND FAILURE OF CONSIDERATION.

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DIVISION I.—MISTAKE.

510. The contract may also be avoided for Mistake, or Failure of Consideration. But there is a very important difference between cases where a contract is rescinded on account of fraud, and those in which the rescission is had on the ground that there is a difference between the thing bargained for and that delivered. In

the former case it is enough to show that the fraudulent representation, which induced the party to enter into the contract which he now seeks to rescind, was made as to any part of the subject-matter; while an innocent misrepresentation or misapprehension does not authorize a rescission for failure of consideration, unless it is such as to show that there is a complete difference in substance between what was supposed to be the thing contracted for and what the contract shows to be the subject-matter. That is, if there be misapprehension as to the substance of the thing there is no contract, but if it be only a difference in some quality or incident, even though the misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding. Or, in other words, to entitle a party to rescind, the mistake must go to the substance of the whole consideration, or, as it were, to the root of the matter.¹

511. In order to avoid or rescind, the mistake need not be mutual, but may only exist in the minds of one of the parties,² though a mutual mistake is necessary to be shown in order to procure a reformation of the contract by one of the parties.³ Thus, the insured may rescind if the policy do not concur with the application.⁴ And the insured's right in such a case to rescind is not affected by the fact that the agent, with or without authority, agreed that the policy shall contain a particular clause, if it does not, in fact, contain it.⁵ The insured may also rescind where the policy is erroneous, owing to the fact that the agent of the insurer made an error in writing down the insured's answers to questions in the application.⁶ The insured may also rescind for a mistake in the nature of the interest.⁷ But a policy for the benefit of certain heirs, issued in the name of the deceased person

¹ See remarks of Blackburn, J., in *War. 363; McHugh v. Imperial F. Ins. Kennedy v. Panama Mail Co., L. R. 2 Co., 48 How. Pr. (N. Y.) 230. Q. B. 580; 587.*

⁴ *Clem v. German Ins. Co., 29 Mo.*

² *Mortimer v. Shortall, 2 Dru. & Ap. 666; Amer. Ins. Co. v. Neiberger, War. 363; Doniol v. Commer. F. Ins. 74 Mo. 167.*

³ *Amer. Ins. Co. v. Neilberger, Co., 34 N. J. Eq. 30; McHugh v. Im- supra.*

⁶ *Plympton v. Dunn, 148 Mass. 523; Wright, 8 Ins. L. J., 169 (Oh.); Spare Mich. Mut. L. Ins. Co. v. Reed, 84 v. Home Mut. Ins. Co. 9 Saw. 142 (D. Mich. 524.*

⁷ *Pike v. Merch. Mut. Ins. Co., 26 Ins. Co., 5 Fed. R. 674 (W. D. Pa.). La. An. 505.*

² *Mortimer v. Shortall, 2 Dru. &*

by an agent who knew the facts, will not vitiate a recovery.¹ So it may be shown that the policy contains a wrong amount.² Where, however, the application was for a policy on "hay in stack and field," the fact that the wording of the policy was "on hay in stack within fifty feet of stable" was held not to be a sufficient discrepancy to entitle the insured to rescind; for the policy was intended to cover hay in stack, and the words "within fifty feet of stable" might be considered as surplusage.³ But it has been held in Canada, that there could not be a return of premiums on a policy defectively issued, though it might be reformed if the insured at its issue was aware of the defect.⁴ If the general agent charges too low a life premium through an error of calculation it has been held that the insurer must pay even if the insured was acquainted with the ordinary rates.⁵ Where through a mutual mistake of the agent and insured as to the surrender value the latter gave up a policy to the company, it should on discovery return it or it will be bound for the amount.⁶

512. Where a company pays over money forgetfully or in ignorance of the facts a suit lies to recover it back.⁷ And the rule seems to be that although the company had the means of ascertaining the facts, it is not sufficient to prevent the recovery, unless it paid carelessly or intentionally, not choosing to investigate.⁸ Where the officers of a company believe that there is a defence on the ground of misrepresentation, but pay a loss to advertise the company, etc., they cannot afterwards set up a mistake.⁹ In Canada, a repayment of money paid by the insurer on a claim was refused on the ground that there had been no intentional concealment by the insured, and the company had not offered to and perhaps could not place the insured in the same position as before the claim was paid.¹⁰ Money

¹ *Anson v. Winnesheik Ins. Co.*, 23 Iowa, 84.

² *Ætna Life Ins. Co. v. Brodie*, 5 Duval (Can.), 1.

³ *Edwards v. Farmers' Ins. Co.*, 74 Ill. 84.

⁴ *Perry v. Newcastle Dist. Mut. F. Ins. Co.*, 8 U. C. Q. B. 363.

⁵ *Jones v. Comm. d'Assur. Mut.* 15 Rev. Leg. (Can.) 500.

⁶ *Lovell v. St. Louis Mut. L. Ins. Co.*, 111 U. S. 264.

⁷ See *Kelly v. Solari*, 9 M. & W. 54;

Columbus Ins. Co. v. Walsh, 18 Mo. 229; *U. S. L. Ins. Co. v. Guarantee*

Trust & Safe Deposit Co., 12 Ins. L. J. 440 (Pa.).

⁸ See *Kelly v. Solari*, 9 M. & W. 54; *Nat. L. Ins. Co. v. Jones*, 1 T. & C. (N. Y.) 466; *Mut. L. Ins. Co. v. Wager*, 27 Barb. (N. Y.) 354.

⁹ *Nat. L. Ins. Co. v. Jones*, 1 T. & C. (N. Y.) 466.

¹⁰ *Royal Ins. Co. v. Byers*, 9 Ont. R. 20.

paid by one with full knowledge, or with the means of full knowledge in his hands, of all the circumstances cannot be recovered back on an allegation that it was paid under a mistake of law.¹ Money paid by mistake to an agent of the insured and placed by him to the account of his principal, but not paid over, may be recovered back from the agent.² And even if the money paid to the agent under mistake has been paid by the latter to his principal he must refund, unless before the payment he disclosed his agency.³

513. In *N. Brit. & Mercant. Ins. Co. v. Stewart*,⁴ the holder of a life policy brought evidence, *bonâ fide*, to show that the insured had died in Australia, and received the amount of the policy, though it turned out later the life was still existing. The company refused to revive the policy, and on a suit in Scotland, by it for a repetition of the sum paid, and a counter-action of the declaration, &c., raised by the policyholder, it was held that the policy was subsisting and that the company must redeliver it on repayment of the sums received with interest, and the premium which had since fallen due. In *Riegel v. Amer. L. Ins. Co.*,⁵ a holder of a policy for six thousand dollars on the life of his debtor exchanged it for a paid-up policy in the sum of two thousand dollars; in point of fact the debtor was dead when the contract of exchange was made, but both the insured and insurer were ignorant of the fact. The insured on learning the truth filed a bill to have the exchange set aside, and a demurrer to the bill was overruled and the insurer ordered to answer.

DIVISION II.—FAILURE OF CONSIDERATION.

514. The insured may rescind the contract in certain cases of failure of consideration and recover back the premium paid. Thus, the insured may rescind for a failure to deliver a policy on a verbal agreement of insurance.⁶ Where there is an attempt to rescind for mistake or failure of consideration after the issue of the policy, it must appear that there was an offer to return the policy, or that the policy was worthless.⁷ It has been held that there can be no

¹ *Bebbie v. Lumley*, 2 East, 469.

² *Buller v. Harrison*, 2 Cowp. 565.

³ *Columbus Ins. Co. v. Walsh*, 18 Mo. 229.

⁴ 9 C. S. C. (3d ser.) 534.

⁵ 140 Pa. St. 193. See same case

again in 153 Ib. 134, setting aside the exchange.

⁶ *Collier v. Bedell*, 39 Hun. (N. Y.) 238.

⁷ *Farrow v. Cochran*, 72 Me. 309.

rescission by the insured for failure in the insurer to issue a paid-up policy, for such refusal does not go to the whole consideration, as the part insurance is part performance.¹

515. Where there is a failure of consideration, caused by the non-attachment of the policy, the insured is entitled to a return of the premium, for risk is essential to the recovery of premium by the insurer; except where there is a clause forfeiting the premiums paid in the event of an untrue statement on the insured, and the policy is issued on the faith of such statements.² For example, there is a failure of consideration if the policy does not attach, because not countersigned by the proper person;³ or because of an unintentional misrepresentation or concealment;⁴ or because the policy would be void, *ab initio*, by reason of the double insurance clause.⁵ Where the contract is divisible, as for instance an insurance on two voyages, and only one is made, there will be a return of the premium.⁶ Where a creditor, not knowing that the Code in Canada, only allowed a creditor to insure up to his debt, insured in a much greater sum, but on finding out the law sought to reduce it, which the company agreed to, he was held entitled to recover the excess paid; and the Court assumed that the proper premium on the smaller amount is a *pro rata* on the larger.⁷ And a sum paid by the payee of a policy and agent of the insured, without authority from home or knowledge of the provisions of the policy, for permission for his principal to reside at Valparaiso for one year, which payment was not needful and did not vary the contract, may be recovered back.⁸

¹ Phoenix Mut. L. Ins. Co. v. Baker, 85 Ill. 410.

⁴ Lynn v. Burgoyne, 13 B. Mon. 400.

² See Anderson v. Thornton, 8 Exch. 425; Thomson v. Weems, 9 Ap. Cas. 671, 682; Penson v. Lee, 2 B. & P. 330; Fowler v. Scot. Equit. Ins. Soc., 28 L. J. Ch. 225; De Hahn v. Hartley, 1 T. R. 343; 2 Ib. 186; Jones v. Ins. Co., 90 Tenn. 604; Nicoll v. Amer. Ins. Co., 3 W. & M. 529 (D. R. I.). See also Amer. Ins. Co. v. Stoy, 41 Mich. 385.

⁵ Feise v. Parkinson, 4 Taunt. 640; Anderson v. Thornton, 8 Exch. 425; Frost v. Saratoga Mut. Ins. Co., 5 Den. (N. Y.) 154; Douglas v. Knickerbocker L. Ins. Co., 83 N. Y. 492; Ins. Co. v. Pyle, 44 Oh. St. 19. Though see Law v. Cent. L. Ins. Co., 6 Bull (Oh.), 666.

⁶ Carpenter v. Continen. Ins. Co., 61 Mich. 635.

⁷ Stevenson v. Snow, 3 Burr. 1237.

³ Duckett v. Williams, 2 Cr. & M. 348; Thomson v. Weems, 9 Ap. Cas. 671, 682; Venner v. Sun L. Ins. Co., 17 Duv. (Cau.) 394.

⁸ Lond. & Lancash. L. Assur. Co. r. Lapierre, 1 L. N. (Can.) 506.

⁹ Forbes v. Amer. Mut. L. Ins. Co., 15 Gray, 249.

516. In *Boldero v. East India Co.*,¹ a fund was created to provide pensions on the retirement from office of the civil servants of the East India Company in Bengal after twenty-five years' service. The fund was derived from a deduction of four and a half per cent. on the salaries, with an equal amount contributed by the company. A scale of the values of the annuities was fixed, and upon the retirement of a member, if the amount paid him with its accumulations were less than one-half of the tabular value of his annuity, he was bound to make up the deficiency. The plaintiff had paid more than the half value, and it was held he was not entitled to have the excess refunded; the contract was plain, and usage would not be of much weight in determining the matter. The case of the *East India Co. v. Robertson*,² arose under a similar system of pensions for the Madras Presidency. It appeared in some instances that the trustees of the fund had returned the excess where an excess of subscriptions had been paid by a subscriber beyond the one-half, and it was held that though there was no regulation to that effect, yet that the practice which had prevailed of the husband to refund the excess contributed precluded the company from disputing payment. In *Secretary of State for India v. Underwood*,³ which arose again under the provisions of the Madras annuity pension fund, there was a resolution inserted in the rules of the subscribers (rule 16) to the effect that if the contributions of any subscriber should be in excess of the one-half value, such excess should be refunded. The directors always objected to this rule, but allowed it to be acted on for some years, until at length they declared in a dispatch that the "practice of refund hitherto allowed should be abrogated," and a special meeting of the subscribers was called by a circular, which stated "it will be observed that the Honorable Court" (of Directors) "has ordered that the practice of refunding the excess be discontinued," and a large majority favored the new rules, which omitted the 16th rule. The Court held that the act of the majority, even under the circumstances under which it took place, bound the whole body, and that no excess made after date could be refunded.

517. It appears in Missouri, that a Statute⁴ provides that the

¹ 26 Beav. 316, affirmed, 12 Moore, P. C. C. 403, note a. See *ante*, § 360.
² 4 Eng. & Ir. Ap. 580.
³ 12 Moore P. C. C. 400.
⁴ Rev. Sts. Mo., 1879 S. 5976.

company should make no defence for misrepresentation, unless, at or before the trial it deposits in Court for the beneficiary the premiums it has received.¹ In Dakota, the Code provided that "a person insured is entitled to a return of the premiums . . . When by any default of the insured other than actual fraud, the insurer never incurred any liability under the policy;" and on a suit by the insured on a note, it was held that a policy is not avoided by innocent misrepresentation, but voidable, and, therefore, the above statute does not apply.² In California, the Code also contains a somewhat similar provision, but it was held that this did not *per se* confer a right on the insured to insist on a forfeiture without cause.³ It has been held in a suit for the return of premium for non-attachment of the policy that the receipt on the policy is conclusive on the company that got the money, which had been paid by the insured to his broker.⁴

518. When the risk has once attached the insured is not entitled to a return of the premiums paid by him.⁵ As where after the policy is issued there is a subsequent breach by the insured.⁶ In *Douglass v. Knickerbocker L. Ins. Co.*,⁷ the policy stipulated for a forfeiture if the insured should travel on the seas without a permit, but nothing was said as to whether the premiums should be forfeited or not for the breach, and it was held on an application to rescind after a breach and recover back the premiums paid, that the implication was that the premiums were forfeited on the committing the breach. But it has been held that this rule must be confined to cases where the insurer is not guilty of a wrongful act. Thus, where the insurer issues a policy, which he subsequently gets from the insured on a promise either to return it or the premiums

¹ *N. Y. L. Ins. Co. v. Fletcher*, 117 U. S. 519. *Co.*, 95 Ind. 254; *Jewett v. Home Ins. Co.*, 29 Iowa, 562; *Phoenix Ins. Co. v. Stevenson*, 78 Ky. 150; *Leonard v. Washburn*, 100 Mass. 251; *De Winton's Case*, 34 L. T. n. s. 942. Though see *Mitchell v. Mut. L. Ins. Co.*, cited in *Bliss on Insurance*, 751.

² *St. Paul F. & M. Ins. Co. v. Neidecken*, 6 Dak. 494.

³ *Joshua Hendy, Etc., v. American Steam Boiler Ins. Co.*, 86 Cal. 248.

⁴ *Dalzell v. Mair*, 1 Camp. 532; *Anderson v. Thornton*, 8 Exch. 425.

⁵ See *McCulloch v. Royal Exchange Assur. Co.*, 3 Camp. 406; *Ætna L. Ins. Co. v. Paul*, 11 Ins. L. J. 314 (Ill.); *Continental L. Ins. Co. v. Houser*, 89 Ind. 258; *Standley v. Northwest Mut. L. Ins.*

⁶ *Phoenix Ins. Co. v. Stevenson*, 78 Ky. 150; *Hawke v. Niagara District Mut. F. Ins. Co.*, 23 Grant Ch. (Can.) 139.

⁷ 83 N. Y. 492.

paid, the insured may recover back the premiums and money expended by him.¹

519. It has been decided that the insured may rescind for the insurer's wrongful refusal to accept further premiums or to wrongfully cancel.² Though the contrary was held in *Standley v. Northern Mutual L. Ins. Co.*³ In *Andrews v. Ætna L. Ins. Co.*,⁴ a notice was sent with a letter by the secretary of the insured, which stated that the company was willing to perform the conditions of a clause as to the return of an equitable value, although this had been inserted by the agent without authority, and denied that the company had declined to refuse to pay the equitable value. In a suit for premiums, it was held that this was an election by the company to affirm an alleged unlawful act, and that such an election to treat the act unauthorized was binding; and, therefore, a suit by the insured to recover back premiums on the ground that there was no contract, because the agent had acted outside his authority, will not thereafter lie.

520. It has been held that a note given for a premium on a policy, issued by a company whose charter would expire by its own limitation before the termination of the insurance, was binding for the unexpired term.⁵

It has been held that a policy issued *bond fide* by an insolvent insurer is a good consideration for a premium note.⁶ And that the subsequent insolvency of the insurer is not a failure of consideration on an advance premium note for the security of dealers,⁷ or for an ordinary premium note.⁸ Apparently, in Illinois, the company's

¹ *Frain v. Metropol. L. Ins. Co.*, 67 Mich. 527.

⁴ 92 N. Y. 596.

² *Day v. Conn. General L. Ins. Co.*, 45 Conn. 480; *Ala. Gold L. Ins. Co. v. Garmany*, 74 Ga. 51; *Ætna L. Ins. Co. v. Paul*, 11 Ins. L. J. 314 (Ill.); *Brooklyn L. Ins. Co. v. Week*, 9 Brad. (Ill.) 358; *McKee v. Phoenix Ins. Co.*, 28 Mo. 383; *Amer. L. Ins. Co. v. McAden*, 1 Alan. R. 256 (Pa.); *Nat. L. Ins. Co. v. Tullidge*, 12 Ins. L. J. 918 (Oh.); *McCall v. Phoenix Mut. L. Ins. Co.*, 916 W. Va. 237. See *ante* § 391-392; *post*, §§ 620, 1197.

⁵ *Huntley v. Beecher*, 30 Barb. (N. Y.) 580.

⁶ *Lester v. Webb*, 5 Allen (Mass.). 569; *Clark v. Middleton*, 19 Mo. 53.

⁷ *Hinkley, Etc., Iron Co. v. Me. Mut. M. Ins. Co.*, 66 Me. 118; *Howard v. Palmer*, 64 Me. 86.

⁸ *Tellon v. City Bank*, 9 Ind. 119; *Hone v. Boyd*, 1 Sand. (N. Y.) 481; *Fourth Nat. Bank v. Snow*, 3 Daly (N. Y.), 167; *N. C. Mut. L. Ins. Co. v. Powell*, 71 N. C. 389; *Sterling v. Mercant. Mut. Ins. Co.*, 32 Pa. 75; *Carey v. Nagle*, 2 Abb. C. C. 156 (D. Wis.).

³ 95 Ind. 254.

insolvency at the execution of the contract was considered good ground for rescission.¹ And it has been held in that State, that the insured may recover from the agent a premium paid to him which the agent had not paid over to the company, and repudiate the policy on the insurer's insolvency.² It has also been held that if the premium note is payable in instalments the insurer's subsequent insolvency is a good defence on an instalment coming due.³ Certain Courts, as has been stated, have held that the insured on an amalgamation may sue the insurer on the policy for breach of contract, though it is not then payable.⁴ And where this rule is established it has also been decided that the amalgamation or insolvency is a good excuse for the non-payment of a premium, and that the failure to pay does not forfeit the policy, but that the insurer is liable as on a breach of contract, as it was bound to keep solvent.⁵ The insured's election to rescind must be made in due season after his discovery of the mistake or failure of consideration, for if he be guilty of laches he will lose the right to do so.⁶

521. While a Court of Equity has jurisdiction to set aside a contract for fraud of the insured,⁷ it has been held that the insurer is not entitled to the aid of a Court of Equity in having a policy cancelled for the insured's breach of a warranty, by showing that fact extrinsically.⁸ Nor probably for want of an insurable interest,⁹ as a Court of law is the proper forum in which to enforce his remedy. In Pennsylvania, however, there is a dictum of Woodward, J., that an insurer could rescind for a breach of warranty as

¹ *Graff v. Simmons*, 58 Ill. 440; *Universal L. Ins. Co. v. Cogbill*, 30 Grat. (Va.) 72. 147; *Taylor v. Charter Oak L. Ins. Co.*, 59 How. Pr. (N. Y.) 468.

² *Smith v. Binder*, 75 Ill. 492. ⁶ *Graff v. Simmons*, 58 Ill. 440; *Howland v. Continen. L. Ins. Co.*, 121

³ *Farm. & Merch. Ins. Co. v. Smith*, 63 Ib. 187; *Home Ins. Co. v. Daubenspeck*, 115 Ind. 306. Mass. 499; *Plympton v. Dunn*, 148 Mass. 523; *Clem v. German Ins. Co.*, 29 Mo. Ap. 666; *Mecke v. L. Ins. Co.*, 8 Phila. 6. See *Farrow v. Cochran*, 72

⁴ *Ante*, § 519. *Post*, § 1197. Me. 309.

⁵ *Jones v. L. Ass'n*, 83 Ky. 75; *People v. Security L. Ins., Etc., Co.*, 78 N. Y. 114; *People v. Empire Mut. L. Ins. Co.*, 92 Ib. 105. See *Hine v. Woolworth*, 93 N. Y. 75; *People v. Globe Mut. L. Ins. Co.*, 32 Hun. (N. Y.)

⁷ *Ante*, § 425.

⁸ *Thornton v. Knight*, 16 Sim. 509; *Conn. Mut. L. Ins. Co. v. Bear*, 26 Fed. R. 582 (E. D. N. C.).

⁹ *Desborough v. Curlew*, 3 Y. & Col. 175 (Exch.).

to incumbrances.¹ It has been held that the insurer may rescind for material misrepresentation, and tender back the premium.²

522. If the insurer defends on the ground of failure of consideration he can only rely upon that operating between the insured and himself, for the insured's right to set it up, as against a third party in respect of the subject-matter of the insurance, cannot affect the insurer.³

¹ *Brown v. Commonw. Mut. Ins. Co.*,
41 Pa. St. 187.

² *Rankin v. Amazon Ins. Co.*, 89
Cal. 203.

³ *Evers v. L. Ass'n*, 59 Mo. 429.

BOOK IV.

PERFORMANCE OF THE CONTRACT.

PART I.

DUTIES OF THE INSURED.

CHAPTER I.

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523. When the contract of insurance is reduced to writing, the prior negotiations of the parties in respect of it are deemed to be merged in the document, which, in law, is conceived to be the evidence of the agreement they finally fix upon.¹ And parol evidence is

¹ See *Mobile L. Ins. Co. v. Pruett*, 14 Ins. L. J. 130 (Ala.); *Clevenger v. Mut. L. Ins. Co.*, 2 Dak. 114; *Sullivan v. Cotton States L. Ins. Co.*, 43 Ga. 423; *Schmidt v. Peoria M. & F. Ins. Co.*, 41 Ill. 295; *Hart. F. Ins. Co. v. Webster*, 69 Ill. 392; *Mills v. Farmers' Ins. Co.*, 37 Iowa, 400; *Moove v. State Ins. Co.*, 72 Iowa, 414; *West. Assur. Co. v. Rector*, 85 Ky. 294; *Nat. Mut. Benef. Ass'n v. Heckman*, 86 Ky. 254; *Lee v. Howard F. Ins. Co.*, 3 Gray (Mass.), p. 589; *Whitney v. Haven*, 13 Mass. 172; *Boright v. Springfield F. & M. Ins. Co.*, 25 N. W. R. 796 (Minn.); *Greenwood v. N. Y. L. Ins. Co.*, 27 Mo. Ap. 401; *Hodge v. Security Ins. Co.*, 33 Hun. (N. Y.) 583; *Weidert v. State Ins. Co.*, 19 Oreg. 261; *Smith v. Nat. L. Ins. Co.*, 103 Pa. St. 177; *Haws v. St. Paul F. & M. Ins. Co.*, 130 Pa. St. 113; *E. Tex. F. Ins. Co. v. Blum*, 76 Tex. 653; *Ins. Co. v. Mowry*, 96 U. S. 544; *Candee v. Cit. Ins. Co.*, 4 Fed. R.

inadmissible to vary its terms.¹ Thus, evidence to the effect that before the issue of the policy the insured told the insurer's agent that the house proposed for insurance would be vacant for some time, and that the agent informed the insured of the condition in the policy against vacancy would not be insisted upon, was held inadmissible where the insured had subsequently accepted a policy containing a clause against vacancy.² The rule just stated does not, however, in the opinion of the author of this Treatise depend upon any principle of evidence at all, though it is frequently said to be based on the principle that parol evidence is inadmissible to vary a writing. But it is submitted that the real ground is, that by a fundamental rule of substantive law an agreement reduced to writing is supposed to contain the parties' meaning, and to be written for that purpose, and therefore parol evidence cannot be admitted to vary it, not because it would vary a writing, or necessarily because a writing is the best evidence, but because it would invalidate or change something which by a fundamental rule of law constitutes the contract. And the same rule would apply if the contract were merely verbal. For while evidence might be very well admitted to show what a contract which rests entirely in parol, or partly in parol and partly in writing, really is, yet it would be senseless to admit it for that purpose when it is known in reality what such contract is. But in an action by the assignee of the insured on a policy

143 (D. Conn.) ; *Albion Lead Works v. Williamsburg City F. Ins. Co.*, 2 Fed. R. 479 (D. Mass.).

¹ *Weston v. Emes*, 1 Taunt. 115 ; *Hare v. Barstow*, 8 Jur. 928 ; *Reis v. Scot. Equitable L. Assur. Soc.*, 2 H. & N. 18 ; *Weinberger v. Merch. Ins. Co.*, 41 La. An. 31 ; *Todd v. Piedmont & Arlington L. Ins. Co.*, 34 La. An. 63 ; *Balt. F. Ins. Co. v. Loney*, 20 Md. 20 ; *Holmes v. Charlestown Mut. F. Ins. Co.*, 10 Met. (Mass.) 211 ; *Finney v. Bedford Commer. Ins. Co.*, 8 Met. (Mass.) 348 ; *Markey v. Mut. Ben. L. Ins. Co.*, 103 Mass. 78 ; *Fitchburg Saving Bk. v. Amazon Ins. Co.*, 125 Mass. 431 ; *Frost's Detroit, Etc., Works v. Miller's & Mfrs. Mut. F. Ins. Co.*, 37 Minn. 300 ; *Bromberg v. Minn. F. Ass'n*, 45 Minn. 318 ; *Bunce v. Beck*, 43 Mo. 266 ; *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568 ; *Alston v. Mechan. Mut. Ins. Co.*, 4 Hill (N. Y.), 329 ; *Mayor v. Brooklyn F. Ins. Co.*, 41 Barb. (N. Y.) 23 ; *Mellen v. Nat. Ins. Co.*, 1 Hall (N. Y.), 452 ; *Pohalski v. Mut. L. Ins. Co.*, 56 N. Y. 640 ; 4 J. & S. (N. Y.) 234 ; *State F. & M. Ins. Co. v. Porter*, 3 Grant (Pa.), 123 ; *Meadowcraft v. Standard F. Ins. Co.*, 61 Pa. St. 91 ; *McLellan v. Keystone Mut. Ins. Co.*, 3 Luz. Leg. Obs. (Pa.) 53 ; *Lynchburg F. Ins. Co. v. West*, 76 Va. 575 ; *Home Ins. Co. v. Gwathmey*, 82 Va. 323 ; *Candee v. Cit. Ins. Co.*, 9 Fed. R. 143 (D. Conn.) ; *Dingee v. Agric. Ins. Co.*, 3 Pug. (N. B.) 80.

² *Hartford F. Ins. Co. v. Davenport*, 37 Mich. 609.

providing that it was "made and accepted upon the representation of the assured contained in his application, to which reference is to be had," parol evidence was held admissible to show that the representations alleged to have been made by the insured were actually made by him, as that does not in any way vary the contract.¹

524. Sometimes, however, the policy does not contain the whole contract, but the contract is made on the faith of a prospectus issued by the insurer, which in certain cases becomes part of the contract. Thus, in England, to a plea that the policy was avoided by an untrue statement, which was made a condition of issuing the policy, and which provided the policy should be void if untrue, a replication which set up that the insurance was taken on the faith of a prior prospectus, which stated that the policy should be indisputable except for fraud, was held good.² And to the same general effect are the decisions in Kentucky, and Missouri.³ In Georgia, and Pennsylvania, it was held that a circular issued prior to the policy, and not referred to in it must be considered as a mere prior negotiation and immaterial.⁴ In New York, in *Ruse v. Mut. L. Ins. Co.*,⁵ it was held that a prospectus cannot control the policy, but on a motion for a reargument of the case, on the ground that certain English decisions had not been looked at by the Court, the Court said that the policy was bad on other grounds, but added that otherwise it might have heard the reargument and come to a different conclusion on this point.⁶ In *Fowler v. Metropolitan L. Ins. Co.*,⁷ it was held that the prospectus was immaterial, because it did not appear that the insured had relied upon it, and *semble* in any event it was inadmissible, as it was a mere prior negotiation merged in the policy.

525. After the completion of the contract, however, the parties may make a verbal agreement to alter or modify its original terms.⁸

526. Parol evidence is also admissible to explain a latent ambi-

¹ *Clark v. Mfrs. Co.*, 8 How. 235.

⁶ 24 N. Y. 653.

² *Wood v. Dwarris*, 11 Exch. 493.

⁷ 116 N. Y. 389.

³ *Steele v. St. Louis Mut. L. Ins. Co.*, 3 Mo. Ap. 207; *South. Mut. L. Ins. Co. v. Montague*, 84 Ky. 653.

⁴ *Mut. Benef. L. Ins. Co. v. Ruse*, 8 Ga. 534; *Smith v. Nat. Ins. Co.*, 39 Leg. Int. (Pa.) 246; 103 Pa. St. 177.

⁸ *Bates v. Grabham*, 2 Salk. 444; *Willcuts v. North West. Mut. L. Ins. Co.*, 81 Ind. 300; *Planters' Mut. Ins. Co. v. Deford*, 38 Md. 382; *Day v. Mechan. & Traders' Ins. Co.*, 88 Mo. 325; *Bunce v. Beck*, 43 Mo. 266.

⁵ 23 N. Y. 516.

guity in the contract.¹ Thus, for example, where the description in the policy was a store building "situate on lots 7 and 8, block 2, in the town of Floris," it was held that it might be shown, that the property was actually situate in lots 7 and 8, block 2, in A.'s addition to the town of Floris, as there was a latent ambiguity that might be shown by parol, and that reformation in equity was not needed.² It has also been said that the same rule of precision and certainty as to evidence, which is required to reform a writing, does not apply to that offered to explain a latent ambiguity.³ The evidence as to a latent ambiguity is for the jury to pass upon.⁴

It is commonly stated that the construction of a patent ambiguity is for the Court.⁵ But it has been said that, if a patent ambiguity is capable of being explained by the circumstances and language, which existed and applied to the contract at its formation, evidence is admissible for that purpose which the jury may pass upon.⁶

527. Parol evidence is also admissible to define artistic or technical terms which are not understood by the generality of people, which is really analogous to allowing a witness to translate evidence from a foreign tongue.⁷ For instance, an expert may explain the meaning of the term "Reserve Dividend Plan."⁸ Parol evidence is also admissible to show that ordinary words have acquired, in a particular species of business, a meaning different from what they possess in

¹ *Taylor v. Briggs*, 2 C. & P. 525; *Hordern v. Commer. Un. Assur. Co.*, 56 L. T. R., n. s. 240; *Claffey v. Hartford F. Ins. Co.*, 8 Pac. R. 711 (Ca.); *N. A. F. Ins. Co. v. Throop*, 22 Mich. 146; *Bunce v. Beck*, 43 Mo. 266; *N. Y. Belting, Etc., Co. v. Wash. F. Ins. Co.*, 10 Bos. (N. Y.) 428; *Fabbri v. Phoenix Ins. Co.*, 55 N. Y. 129; *Burr v. Broadway Ins. Co.*, 16 N. Y. 267; *Lycom. Mut. Ins. Co. v. Sailer*, 67 Pa. St. 108; *Weisenberger v. Harmony F. & M. Ins. Co.*, 56 Pa. St. 442; *Wait v. Fairbanks, Brayton (Vt.)*, 77; *Noyes v. Canfield*, 27 Vt. 79.

² *Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa, 308.

³ *Lycom. Mut. Ins. Co. v. Sailer*, 67 Pa. St. 108.

⁴ *Taylor v. Briggs*, 2 C. & P. 525; *Hordern v. Commer. Un. Assur. Co.*, 56 L. T. R., n. s. 240; *Lycoming Mut. Ins. Co. v. Sailer*, 67 Pa. St. 108.

⁵ *Lapeer Co. Farmers' Mut. F. Ins. Ass'n v. Doyle*, 30 Mich. 159; *Webster v. Atkinson*, 4 N. H. 21.

⁶ *Ganson v. Madigan*, 15 Wis. 144.

⁷ *State Ins. Co. v. Horner*, 14 Colo. 391; *Webb v. Nat. F. Ins. Co.*, 2 Sand. (N. Y.) 497; *Nelson v. Sun. Mut. Ins. Co.*, 71 N. Y. 453; *Weisenberger v. Harmony F. & M. Ins. Co.*, 56 Pa. St. 442; *Wait v. Fairbanks, Brayton (Vt.)*, 77.

⁸ *Fuller v. Kuapp*, 14 Ins. L. J. 677 (S. D. N. Y.).

their ordinary use.¹ For example, parol evidence is admissible to show the trade meaning of "good wheat" and "fine wheat," and that they are each different commodities;² or what the words "tile season" meant;³ or that "store fixtures" in a policy meant all the furniture and other articles in a shop or warehouse, which are convenient for use in the trade;⁴ or that the word "roots," which in New York was first inserted in policies in 1787, was confined to such as are perishable, and does not include "sarsaparilla."⁵ Or the meaning of "spitting of blood."⁶

528. But to admit such evidence it must be clear that the words have acquired a new signification in the trade or mercantile world, and are not words employed with their usual significance. Thus, in *Hegard v. Cal. Ins. Co.*,⁷ it was held parol evidence was inadmissible to show what "bar-room fixtures" are. Or the meaning of the word "permanent risk."⁸ Or that the words "House standing detached" have a special meaning among insurance men where there was no offer to show that the plaintiff knew of such meaning.⁹

529. It will be observed that there is a distinction between the effect of parol evidence introduced to define or translate unknown words of art or technique, and to define a new meaning which a

¹ See *Jenny Lind Co. v. Bower*, 11 Cal. 194; *Robertson v. Money*, R. & Moo. 75; *Taylor v. Briggs*, 2 C. & P. 525; *Smith v. Wilson*, 3 B. & Adol. 728; *Spicer v. Cooper*, 1 Q. B. 424; *Beacon L. & F. Assur. Co.*, 1 Moore P. C. C. N. s. 73; *Stewart v. Smith*, 28 Ill. 397; *Katon v. Smith*, 20 Pick. (Mass.) 150; *Howard v. Great West. Ins. Co.*, 109 Mass. 384; *Houghton v. Watertown F. Ins. Co.*, 131 Ib. 300; *Mooney v. Howard Ins. Co.*, 138 Ib. 375; *Sleght v. Hartshorne*, 2 John. (N. Y.) 531; *Hone v. Mut. Safety Ins. Co.*, 1 Sand. (N. Y.) 137; *Child v. Sun Mut. Ins. Co.*, 3 Ib. 26; *Nelson v. Sun Mut. Ins. Co.*, 71 N. Y. 453; *Reid v. Lancaster F. Ins. Co.*, 90 Ib. 382; *Bargett v. Orient Mut. Ins. Co.*, 3 Bos. (N. Y.) 385; *Eyre v. M. Ins. Co.*, 5 W. & S. (Pa.) 116; *Brown v. Brooks*, 25 Pa. St. 210; *Weisenberger v. Harmony F. & M. Ins. Co.*, 56 Pa. St. 442; *Carey v. Bright*, 58 Pa. St. 70; *Evans v. Commer. Un. Ins. Co.*, 6 R. I. 47; *Hart v. Hammett*, 18 Vt. 127; *Connolly v. Provincial Ins. Co.*, 1 L. N. (Can.) 33.

² *Hutchinson v. Bowker*, 5 M. & W. 535.

³ *Mich. Mut. L. Ins. Co. v. Custer*, 128 Ind. 25.

⁴ *Whitmarsh v. Conway F. Ins. Co.*, 16 Gray (Mass.), 359.

⁵ *Coit v. Com. Ins. Co.*, 7 John. (N. Y.) 385.

⁶ *Singleton v. St. Louis Ins. Co.*, 66 Mo. 63.

⁷ 11 Pac. R. 594 (Cal.).

⁸ *Trustees First Baptist Church v. Brooklyn F. Ins. Co.* 28 N. Y. 153.

⁹ *Hill v. Hibernia Ins. Co.*, 10 Hun. (N. Y.) 26.

word has acquired by usage in a trade. For the only proposition in the former case is to know whether the meaning of the word is known or understood ; while in the latter case there are two quite distinct questions. Has the word a new meaning? Is the usage reasonable or legal which has given it this meaning, as respects the party against whom the evidence is offered? In *Cash v. Hinkle*,¹ where the contract called for "65 head of fat hogs, to weigh 225 lbs. and over," it was held that parol evidence to show a usage that this language meant that the hogs should average that weight was inadmissible. And in *F. Ins. Co. v. Davidson*,² it was held that the insurer could not show by its secretary that a "carpenter's risk" was understood in the office of the defendant to refer to the employment and work of carpenters in adding to or repairing buildings ; the term was clear and the custom of the insurer's office was not material. This distinction was very clearly pointed out in *Nelson v. Sun Mut. Ins. Co.*,³ where the term "Port risk" was held a technical phrase, which parol evidence was admissible to explain, on the ground that it was not a word known in general use which was applied to a new use, but the two words were employed to make up a third word that had no meaning unless a technical one, and, therefore, the expert called upon to explain the term did not prove a usage that certain words had acquired a new use in a particular trade, but explained a term of art otherwise incomprehensible. The dictionary is not evidence to show a peculiar meaning of a word derived from mercantile usage.⁴ It has been held that evidence to show that the meaning of a word, at a place other than where the word was used or meant to apply, is not admissible.⁵ The evidence as to technical terms used in a writing is for the jury.⁶

530. An expert may testify as to matters of art, science, or trade, with which he is peculiarly familiar, and one not offered as an expert though he may be peculiarly skilled in respect of a line of business or scientific research, cannot express his opinion of the effect of certain facts in such cases, but must state the facts on which his

¹ 36 Iowa, 623.

² 30 Md. 91.

³ 71 N. Y. 453.

⁴ *Houghton v. Gilbert*, 7 C. & P. 701.

⁵ *Germania F. Ins. Co. v. Francis*, 52 Miss. 457.

⁶ *Taylor v. Briggs*, 2 C. & P. 525 ; *Eaton v. Smith*, 20 Pick. (Mass.) 150 ; *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y. 6.

opinion may have been based, and let the jury draw the inferences from those facts.¹ The medical examiner, or agent of the insurer, cannot state whether the insurer would have taken the risk, or whether the witness would have recommended it, had the facts been other than represented, on an issue of whether there has or has not been a misrepresentation.²

531. In all contracts of insurance there is an implied condition or warranty that the insured shall truthfully represent to the insurer every fact material to the proposed risk which lies exclusively within his own knowledge, and which is not embraced by an agreement in the policy. And as the contract of insurance proceeds upon the basis that all material facts have been truly disclosed, parol evidence is always admissible on the part of the insurer to show, in avoidance of his liability on the contract, that the insured did not truly and fairly disclose the facts material to the risk. This evidence cannot in any sense contradict the contract, but simply discloses whether there has or has not been a breach of the implied warranty.³ A representation may be defined to be a verbal or written statement as to certain facts made by the insured at the time of the formation of the contract which constitutes an inducement for the insurer to form the contract. A representation is never contained in the contract, but is collateral to it.⁴

Care must be taken to distinguish the effect of a representation in respect of insurance from a representation in regard to contracts of sale. Representations in the latter case do not form the basis of the contract, and their untruth, though material, does not avoid it

¹ See *Higbie v. Guardian Mut. L. Ins. Co.*, 50 N. Y. 603; *Grattan v. Metropolitan L. Ins. Co.*, 80 Ib. 281.

² See *Berthon v. Loughman*, 2 Stark. R. 229; *Northw. Benev. & Mut. Aid Ass'n v. Hall*, 6 West. R. 76 (Ill.); *Wash. L. Ins. Co. v. Haney*, 10 Kan. 525; *Rawls v. Amer. Mut. L. Ins. Co.*, 27 N. Y. 282; *Mut. Ben. L. Ins. Co. v. Wise*, 34 Md. 582; *Lightbody v. N. Amer. Ins. Co.*, 23 Wend. (N. Y.) 18; *Higbee v. Guardian Mut. L. Ins. Co.*, 53 N. Y. 603; *Schwarzbach v. Oh. Val. Prot'v' Un.*, 25 W. Va. 622.

³ *Wainwright v. Bland*, 1 Mo. &

Rob. 481; *Mut. Benef. L. Ins. Co. v. Robertson*, 59 Ill. 123; *Wallace v. Council Bluffs Ins. Co.*, 14 Ins. L. J. 489 (Iowa); *Parks v. General Interest Assur. Co.*, 5 Pick. (Mass.) 34; *Kimball v. Aetna Ins. Co.*, 9 Allen (Mass.), 540; *Campbell v. New Eng. Mut. L. Ins. Co.*, 98 Mass. 390; *Higbie v. Guardian Mut. L. Ins. Co.*, 53 N. Y. 603; *Ryan v. Springfield F. & M. Ins. Co.*, 46 Wis. 671.

⁴ *Campbell v. New Eng. Mut. L. Ins. Co.*, 98 Mass. 381; *Bryant v. Ocean Ins. Co.*, 22 Pick. (Mass.) 200; *Blumer v. Phoenix Ins. Co.*, 45 Wis. 622.

unless fraudulently made.¹ But in the case of insurance, though it was at one time asserted by some authorities that a representation must be fraudulent to avoid the insurance,² it is now well settled that an untrue material representation will avoid the insurance,³ though innocently made.⁴ Nor is the beneficiary's ignorance of the untruth of a representation in a life policy material.⁵ The materiality of a representation does not depend upon the fact that the loss is attributable to it, but whether it fairly tended to induce the insurer to underwrite the risk.⁶ And one test of the materiality of a representation is the rate of premium.⁷

532. One principal distinction between a representation and a condition or warranty is, that while a warranty must be strictly

¹ See *Behn v. Burness*, 3 B. & S. 751. See *post*, § 557.

² See *Pawson v. Watson*, Cowp. 785; *Bize v. Fletcher*, 1 Doug. 284.

³ *Pawson v. Watson*, 2 Cowp. 785, 788; *Newcastle F. Ins. Co. v. MacMurrin*, 3 Dow, 255; *Ala. Gold L. Ins. Co. v. Johnston*, 80 Ala. 467; *Continental Ins. Co. v. Rogers*, 119 Ill. 474; *Prudential Ins. Co. v. Fredericks*, 41 Sm. (Ill.) 419; *Mut. Benef. L. Ins. Co. v. Miller*, 39 Ind. 475; *Witherell v. Me. Ins. Co.*, 49 Me. 200; *Angusta Ins. & Banking Co. v. Abbott*, 12 Md. 348; *Mut. Ins. Co. v. Deale*, 18 Md. 26; *Ætna Ins. Co. v. Grube*, 6 Minn. 82; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; *Co-op. L. Ass'n v. Leflore*, 53 Miss. 1; *Digby v. Amer. Cent. Ins. Co.*, 3 Mo. Ap. 603; *Boardman v. N. H. Mut. F. Ins. Co.*, 20 N. H. 551; *Owens v. Holland Purchase Ins. Co.*, 56 N. Y. 565; *Armour v. Transatlantic F. Ins. Co.*, 90 Ib. 450; *Ætna Ins. Co. v. Reed*, 33 Oh. St. 283; *Chrisman v. State Ins. Co.*, 16 Oreg. 283; *Continental Ins. Co. v. Kasey*, 25 Grat. (Va.) 268; *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25; 10 Pet. 507; *Livingston v. Md. Ins. Co.*, 7 Cranch, 506; *Carpenter v. Amer. Ins. Co.*, 1 Story,

57 (D. R. I.); *Nicoll v. Amer. Ins. Co.*, 3 W. & M. 529 (D. R. I.).

⁴ See *Ala. Gold L. Ins. Co. v. Johnston*, 80 Ala. 467; *Mut. Benef. L. Ins. Co. v. Miller*, 39 Ind. 475; *Angusta Ins. & Banking Co. v. Abbott*, 12 Md. 348; *Cobb v. Covenant Mut. Benef. Ass'n*, 153 Mass. 176; *Co-op. L. Ass'n v. Leflore*, 53 Miss. 1; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; *Digby v. Amer. Cent. Ins. Co.*, 3 Mo. Ap. 603; *Armour v. Transatlantic F. Ins. Co.*, 90 N. Y. 450; *Ætna Ins. Co. v. Reed*, 33 Oh. St. 283; *Byers v. Farmers' Ins. Co.*, 35 Ib. 606; *Melvin v. Ins. Co.*, 1 Luz. Leg. Reg. (Pa.) 219; *Continental Ins. Co. v. Kasey*, 25 Grat. (Va.) 268; *Tex. Mut. L. Ins. Co. v. Davidge*, 51 Tex. 244; *Carpenter v. Amer. Ins. Co.*, 1 Story, 57 (D. R. I.).

⁵ *Centen. Mut. L. Ass'n v. Parham*, 80 Tex. 518.

⁶ *Boggs v. America Ins. Co.*, 30 Mo. p. 68; *West. Farmer's Mut. Ins. Co. v. Miller*, 1 Handy, 325 (Oh.); *Hartman v. Keystone Ins. Co.*, 21 Pa. St. p. 477; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507; *Nicoll v. Amer. Ins. Co.*, 3 W. & M. 529 (D. R. I.).

⁷ *Nicoll v. Amer. Ins. Co.*, 3 W. & M. 529 (D. R. I.).

performed, the truth of the former need only be substantially proved.¹ Another important distinction is that while the insured has the burden of showing the performance of a warranty, because it is in the nature of a condition precedent, the insurer must sustain the burden of showing the untruth and materiality of a representation.² The materiality of a representation is for the jury,³ except perhaps where all the facts are specially found or are admitted.⁴

533. Representations have been divided into two classes: Affirmative and promissory.⁵ The former aver the actual existence of a fact, the latter that such fact shall thereafter exist. This distinction is, however, rather one of form than of substance, as in a large number of cases positive representations are in effect promissory. As for instance, a representation that a house is built of

¹ *Pawson v. Watson*, 2 Cowp. 785, (La.) 266; *Mut. Benef. L. Ins. Co. v. 788*; *De Hahn v. Hartley*, 1 T. R. 343; *Wise*, 34 Md. 582; *Franklin F. Ins. Co. v. Coates*, 14 Md. 285; *Mut. F. Ins. Protec. Ins. Co.*, 21 Conn. 19; *Miller v. Co. v. Deale*, 18 Md. 26; *Gerhauser v. N. Brit. & Mercant. Ins. Co.*, 7 Nev. 174; *Boardman v. New Hamp. Mut. F. Ins. Co.*, 20 N. H. 551; *Clark v. Un. Mut. F. Ins. Co.*, 41 N. H. 333; *N. Y. Firemen Ins. Co. v. Walden*, 12 John. (N. Y.) 513; *Farmers' Ins. & Loan Co. v. Snyder*, 16 Wend. (N. Y.) 481; *Sexton v. Montgoin. Co. Mut. Ins. Co.*, 9 Barb. (N. Y.) 191; *Shoemaker v. Glen's Falls Ins. Co.*, 60 Ib. 84; *People v. Liv. & Lond. & Globe Ins. Co.*, 2 T. & C. (N. Y.) 268; *Hartford Protec. Ins. Co. v. Harmer*, 2 Oh. St. 452; *Pottsville Mut. F. Ins. Co. v. Meekes*, 10 Ins. L. J. 717 (Pa.); *Lindsay v. Un. Mut. F. Ins. Co.*, 3 R. I. 157; *Ins. Co. v. Lewis*, 48 Tex. 622; *Md. Ins. Co. v. Ruden*, 6 Cranch, 338; *Mulville v. Adams*, 19 Fed. R. 887 (N. D. N. Y.); *Hardman v. Firemen's Ins. Co.*, 20 Fed. R. 594 (E. D. La.); *Williams v. Buffalo German Ins. Co.*, 17 Fed. R. 63 (D. Ky.); *Goring v. Lond. Mut. L. Ins. Co.*, 5 Can. L. T. 373.

² See *Continental L. Ins. Co. v. Rogers*, 119 Ill. 474; *Miller v. Mut. Benef. L. Ins. Co.*, 31 Iowa, 216; *William v. Niag. F. Ins. Co.*, 50 Iowa, 561; *Campbell v. New Eng. Mut. Ins. Co.*, 98 Mass. 381; *Clapp v. Mass. Benef. Ass'n*, 146 Ib. 519; *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497; *Sadler v. Mobile L. Ins. Co.*, 60 Miss. 391; *Un. Ins. Co. v. McGookey*, 33 Oh. St. 555.

³ *Rawlins v. Desborough*, 2 M. & Rob. 328; *Abbott v. Howard*, *Huyes Ir.* 381; *Lindenau v. Desborough*, 8 B. & C. 586; *Lyon v. Commer. Ins. Co.*, 2 Rob.

⁴ *Ryan v. Springfield F. & M. Ins. Co.*, 46 Wis. 671.

⁵ See *post*, § 566.

brick, or that a factory is supplied with ample means of extinguishing fires, or that a watchman is kept, or that the life in time of war is not of a belligerent nation. For the representation would be perfectly valueless if, immediately after the issue of the policy, the brick house was changed to a wooden house, or the factory was at once deprived of all appliances to extinguish fires, or the watchman withdrawn, or the "life" enter a hostile army. A distinction, however, has been taken between the effect of affirmative and promissory representations, and, it is said, while affirmative representation will avoid the contract, though innocently made, a promissory representation, being only the expression of a belief or expectation, will not avoid it unless fraudulently made.¹

534. The distinction appears to have been first taken by Lord Tenterden in *Flinn v. Tobin*,² at Nisi Prius. This position, however, was apparently abandoned by Lord Tenterden in the later case of *Flinn v. Headlam*,³ and, indeed, is totally opposed to the English decisions.⁴ In the United States, in *Alston v. Mechan. Mut. Ins. Co.*,⁵ the Chancellor, Walworth, arrived at the conclusion that a representation of a future event could never be construed as promissory, but as expressing merely an expectation or belief, and consequently only avoiding a policy when fraudulently made. But, as is stated by Mr. Duer, in his able *Treatise on Insurance*,⁶ the opinion of the Chancellor contains no examination or even a transient notice of the leading and most important English cases, with the single exception of *Dennistoun v. Lillie*,⁷ which recognized that promissory warranties had the same effect in avoiding the contract as those that were affirmative. The Chancellor cited a dictum of Parker, J., in *Rice v. New Eng. M. Ins. Co.*,⁸ which represented his view, and also the case of *Allegre v. Md. Ins. Co.*,⁹ in which the reasoning of the Court, though not the actual decision, supported

¹ *Kimball v. Aetna Ins. Co.*, 9 Allen (Mass.), 540; *Alston v. Mechan. Mut. Ins. Co.*, 4 Hill (N. Y.), 329; *Murdock v. Chenango Co. Mut. Ins. Co.*, 2 N. Y. 210; *Mayor v. Brooklyn F. Ins. Co.*, 4 Keys (N. Y.), 465; *Insurance Co. v. Mowry*, 86 U. S. 544.

² 1 Moo. & Mal. 367.

³ 9 B. & C. 693, 696.

⁴ See *Steel & Lacy*, 3 Taun. 285;

Feise v. Parkinson, 4 Ib. 640; *Edwards v. Footner*, 1 Camp., 530; *Dennistoun v. Lillie*, 3 Bligh, P. C. 102; *Arnould on Ins.* 523.

⁵ 4 Hill (N. Y.), 329.

⁶ Vol. II. p. 716.

⁷ *Post*, § 536.

⁸ 4 Pick. 439.

⁹ 2 G. & J. (Md.) 136.

his views. The same view was taken in *Bryant v. Ocean Ins. Co.*,¹ but without an examination of the authorities, and Mr. Duer observes of Judge Wilde's opinion in this last case,² that "he advances positions that, if adopted, would carry us back to the very infancy of the law of insurance, and, on the subject of representations, would sweep away nearly all the decisions of more than half a century. . . . He also relies on *Bize v. Fletcher* as a conclusive authority, not advertng to the true ground of the decision, but evidently interpreting the language of Lord Mansfield, which, as applied to the particular circumstances of the case, is perfectly just, as expressing or designing to establish a general rule. On this subject I have only to make this conditional remark, that this novel interpretation (for novel it certainly is) of *Bize v. Fletcher*³ is wholly inconsistent, not only with subsequent decisions, but with Lord Mansfield's own language in *Pawson v. Watson*,⁴ and *MacDonald v. Frazier*."⁵ In *Murdock v. Chenango Co. Mut. Ins. Co.*,⁶ the statement of Strong, J., on page 220, that a promissory representation could not exist, was merely obiter, based on no authority, except that of Walworth, C. And *Mayor of N. Y. v. Brooklyn F. Ins. Co.*⁷ merely followed those cases, citing no authorities.

535. In *Kimball v. Aetna Ins. Co.*,⁸ Gray, J., in a persuasive and very elaborate opinion, came to the conclusion reached by Walworth, C., that a verbal promissory representation is a mere expectation and will not avoid the contract if untrue, unless fraudulent. In the course of his opinion, however, that learned Judge draws a distinction between written and verbal promissory representations, and states that an oral promissory representation cannot avoid unless fraudulent, while a written promissory representation, which he says may be in the application or policy, stands on a different footing and is the evidence of the duties of the parties. It is not clear whether the word representation is used synonymously with warranty. Apparently it is not. If not, it is not understood how a representation technically can be in a policy at all; nor in any event how it can affect the question. For the universal rule

¹ 22 Pick, 200.

⁵ 1 Dough. 260.

² Duer on Insurance, vol. II., pp. 764-5.

⁶ 2 N. Y. 210.

³ Park on Insurance, 441.

⁷ 4 Keyes (N. Y.), 465.

⁴ Cowp. 785.

⁸ 9 Allen (Mass.), 540.

is that a written application stands on no higher ground than a verbal application, and in either case a material untrue statement of a fact will avoid the contract. But if a representation as to the future is not material when verbal, how can it change its character because written? In neither case is it part of the contract. If the learned Judge's reasoning is correct, a representation of a promissory nature has a hybrid character, and is one thing when verbal and another when written, though in neither case forming a part of the contract, but in both cases forming only the ground for setting it aside. Again, if his reasoning is correct, how can a fraudulent representation as to the future be a ground of avoidance? Fraud is not a ground of avoidance unless material. And materiality is not a question of motive, but depends upon whether the representation made has induced or is a leading motive in inducing the other party to contract. How then can a man be said to be able to tell an intentional untruth of a material nature, when he cannot make an innocent material misstatement? It is submitted, therefore, that the position that a representation cannot be construed as promissory, or that when promissory the effect is different from an affirmative representation, is unsound, and opposed, as has been stated, to the great majority of decided cases.¹

536. There is a great distinction between the representation of a fact and of a mere opinion or expectation. But a representation as to the future may be of a fact just as well as one to the past. The true rule was stated by Lord Eldon in *Dennistoun v. Lillie*.² There is a difference between the representation of an expectation and the representation of a fact. The former is immaterial, but the latter avoids the policy if the fact misrepresented be material to the risk.

537. Besides the implied condition that the insured will truthfully represent material facts, there is also an implied condition that the insured, at the time of the formation of the contract, will not conceal any information within his knowledge which is material to the risk, and the failure to do this will avoid the contract.³ If the

¹ *Blumer v. Phoenix Ins. Co.*, 45 Wis. 622. in *Walden v. Firemen's Ins. Co.*, 12 John. (N. Y.) 136. See also *Moens v.*

² 3 Bligh P. C. 102. See also the opinion of Lyon, J., in *Blumer v. Phoenix Ins. Co.*, 45 Wis. 622. *Heyworth*, 10 M. & W. 147; *Lindenau v. Desborough*, 8 B. & C. 586; *Shoolbread v. Nutt*, cited in *Park on Insurance*, 229, a; *Lynch v. Hamilton*, 3

³ See *Kohne v. Ins. Co. of N. A.*, cited

insured conceals anything that he knows to be material, it is a fraud; and if he conceals anything that may influence the rate of premium, although he does not know it, it still vitiates the policy.¹ For insurance is a contract on speculation, and the underwriter must necessarily trust to the frankness of the insured, in whose knowledge the facts usually must lie, that he will not keep anything back to the prejudice of the insurer.² And, therefore, it is said there must be always the utmost good faith, *uberrima fides*, on the part of the insured,³ though, as was remarked by Jewett, J., in *Gates v. Madison Co. Mut. Ins. Co.*,⁴ at page 474, "when it is said to be a contract *uberrimæ fidei*, this only means that good faith, which is the basis of all contracts, is more especially required in that species of contract in which one of the parties is supposed to be necessarily less acquainted with the details of the subject of the contract than the other;" and does not mean there shall be a different standard of morality in insurance than in other contracts. Thus, in *W. Farmers' Mut. Ins. Co. v. Miller*,⁵ Stover, J., observed: "We find no difference in the degree of fairness and honest intention required in all agreements, whether they pertain to the sale of merchandise, the performance of stipulated duties, or the insurance upon property. Good faith lies at the foundation of all contracts, and where it is essentially wanting the obligation to perform them is at an end; but what good faith is, how far it extends, and how it is to be estimated, must depend, not upon doubtful constructions or nice distinc-

Taunt. 37; *Anderson v. Thornton*, 8 170; *Columbia Ins. Co. v. Lawrence*, 2
Rxch. 425; *Abbott v. Howard*, *Hayes* *Ib.* 25; 10 *Pet.* 507; *Vale v. Phoenix*
(Ir.), 381; *Beebe v. Hartford Co. Mut. Ins. Co.*, 1 *Wash.* 283 (*D. Pa.*); *Bulk-*
F. Ins. Co., 25 *Conn.* 51; *Protec. Ins. ley v. Protec. Ins. Co.*, 2 *Paine*, 82 (*D.*
Co. v. Hall, 15 *Ky.* 411; *Md. Ins. Co. Conn.*); *Waller v. North. Assur. Co.*, 2
v. Bathurst, 5 *G. & J. (Md.)* 159; *McCreary*, 637 (*D. Iowa*).

Planters' Ins. Co. v. Myers, 55 *Miss.* 1 *Lond. Assur. v. Mansel*, 11 *Ch. D.*
 479; *Marshall v. Columbian Mut. F.* 363, 368.

Ins. Co., 27 *N. H.* 157; *Gates v. Madi-* 2 *Carter v. Boehm*, 3 *Burr.* 1905.

son Co. Mut. Ins. Co., 5 *N. Y.* 468; 3 *See Equitable L. Assur. Soc. v. Pat-*
Whitehurst v. Fayetteville Mut. Ins. terson, 41 *Ga.* 338; *South L. Ins. Co.*
Co., 6 *Jones (N. C.)*, 352; *Lexington v. Wilkinson*, 53 *Ib.* 536; *Lycoming F.*
Ins. Co. v. Paver, 16 *Oh. R.* 324; *Ins. Co. v. Ruben*, 8 *Chic. L. M.* 150
Merch. & Mfrs. Mut. Ins. Co. v. Wash. (Ill.); *Smith v. Columbia Ins. Co.*, 17
Mut. Ins. Co., 1 *Handy (Oh.)*, 408; *Pa. St.* 253.

Pine v. Vanuxem, 3 *Yeates (Pa.)*, 30; 4 1 *Seld. (N. Y.)* 469.

McLanahan v. Univ. Ins. Co., 1 *Pet.* 5 1 *Handy (Oh.)*, 325.

tions; it is simply the application of the maxim, as old in law as it is true in ethics, '*sic utere tuo, ut non alienum non lædas.*' It has been suggested that there is a difference as to the degree of concealment necessary to avoid a contract in marine, fire, and life insurances. If there be such, it is simply in degree, and not in principle. Possibly in marine insurance, from the nature of the business, the applicant must disclose more facts than in fire.¹ There are *dicta* to the effect that the disclosures in life insurance need not be so ample as in fire or marine, as the insurer stands in a better position, having his own medical examiner.² In *Lond. Assur. v. Mansel*,³ Sir George Jessel repudiated the idea that there was any difference in substance as regards the general principle between one contract of insurance and another. "Whether it is life, or fire, or marine assurance, I take it good faith is required in all cases, and, though there may be certain circumstances, from the peculiar nature of marine insurance, which require to be disclosed and which do not apply to other contracts of insurance, that is rather, in my opinion, an illustration of the principle than a distinction in principle."

538. The failure of the insured to disclose facts material to the risk, or, as it is technically termed, concealment, may be defined to be the insured's intentional or negligent omission, at the time of the formation of the contract, to disclose the existence of facts within his knowledge which fairly tend to induce the insurer to form the contract, and of which the insurer has no knowledge or reasonable means of knowledge. As in the case of representations, the concealment need not be intentional to avoid the insurance.⁴ Thus, it was held in *Lynch v. Dunsford*,⁵ that material intelligence which was false, yet if believed to be true and not disclosed, would avoid the policy. Though in *North Brit. Ins. Co. v. Lloyd*,⁶ it was held that the same rule does not prevail in the case of guarantees as in insurances upon ships or lives, in which it is a settled rule that

¹ *Jolly's Adm. v. Balt. Equit. Soc.*, 1 H. & G. 295 (Md.); *Boggs v. American Ins. Co.*, 30 Mo. 63; *Farmers' Ins. & Loan Co. v. Snyder*, 16 Wend. (N. Y.) 481; *Burritt v. Saratoga Co. Mut. F. Ins. Co.*, 5 Hill (N. Y.), 188; *People v. Liv. & Lond. & Globe Ins. Co.*, 2 T. & C. (N. Y.) 268; *Hart. Protec'n Ins. Co. v. Harmer*, 2 Oh. St. 452.

² See *Horn v. Amicable Mut. L. Ins. Co.*, 64 Barb. (N. Y.) 81.

³ 11 Ch. D. 363, 366.

⁴ *Abbott v. Howard, Hayes (Ir.)*, 381; *Beebe v. Hart. Co. Mut. F. Ins. Co.*, 25 Conn. 51.

⁵ 14 East, 494.

⁶ 10 Exch. 523.

all material circumstances known to the insured are to be disclosed, though there be no fraud in the concealment. But the doctrine as to guarantees is that the guarantee will not be avoided by a material concealment unless fraudulent. An example of concealment is had in *Bufe v. Turner*; ¹ a boat-builder's shop, next but one to a warehouse, took fire, and after the fire had been apparently extinguished the owner of the warehouse and of others at a distance gave instructions by an extraordinary conveyance to insure the warehouse in the vicinity of the fire, but not the others, and it was held a material concealment, though fraud was negated. So in *Lyon v. Commer. Ins. Co.*, ² where during the negotiations the insured expressed an objection to insuring in the neighborhood of gaming-houses; and it was left to the jury to say whether the applicant should have disclosed the fact of there being such within the property to be insured. In *Aitken v. Nat. Ins. Co.*, ³ an insurance taken on a saw-mill, without disclosing that the building contained a planing-mill, was held a material concealment. In *Pelzer Mfg. Co. v. St. Paul F. & M. Ins. Co.*, ⁴ a failure of the owner of the property, which is proposed for insurance and which is exposed to danger from fire from a railway, to state that he had released the railway company, was held a question for the jury.

539. It is the duty of the insured not only to communicate to the underwriter articles of intelligence which may affect his choice as to whether he will insure at all, and as to the premium at which he will insure, but likewise all rumors and reports which may tend to enhance the magnitude of the risk.⁵ Thus, the failure to communicate an anonymous letter containing intelligence as to loss of a ship is concealment.⁶ And so also the failure in merchants, who are insuring for their security goods of a customer under his control, to state that the customer was fraudulently making away with his property.⁷ So it has been held that the insured should disclose rumors of arson which have induced him to insure a building.⁸ But

¹ 6 Taunt. 338.

² 2 Rob. (La.) 266.

³ 1 L. N. (Can.) 531. See the rule laid down in *Wilson v. State Ins. Co.*, 7 L. Can. J. 223.

⁴ 41 Fed. R. 271 (D. S. C.).

⁵ *Durrell v. Bederly*, 1 Holt, N. P. 283.

⁶ *Leigh v. Adams*, 25 L. T. n. s. 566.

⁷ *Rawls v. Amer. Mut. L. Ins. Co.*, 27 N. Y. 282.

⁸ See *Walden v. La. Ins. Co.*, 12 La. 134. But see *Clark v. Hamilton Mut. Ins. Co.*, 9 Gray (Mass.), 148.

these rumors should be such as would influence an ordinarily prudent man. For example, a mere idle threat made during the progress of an election, several months before the issue of the policy, to burn the insured's building, to which nobody paid any attention, and which was unconnected with the loss, need not be disclosed.¹ Nor need the insured disclose mere idle gossip.² Nor need the fact that the insured is decidedly unpopular or obnoxious in the neighborhood be disclosed.³ Repeated fires at similar buildings belonging to the owner, coupled with the fact that a company therefore had declined to insure, should obviously be disclosed on a subsequent proposal.⁴ But it has been held that a local usage is not admissible to show a custom to communicate the fact of a recent fire on the building before the risk was taken.⁵ It is hard to state with precision what would be a sufficient disclosure of arson. Probably a general disclosure of the facts without a minute elaboration of the specific number of the fires would be enough.⁶ Where the applicant is required by the insurer to state whether he is in apprehension of incendiarism, *a fortiori* is he bound to a full disclosure? In *Greet v. Citizens' Ins. Co.*,⁸ where the questions in the application were: "Have you any reason to believe that your property is in danger from incendiarism?" and "Have you any reason to suppose that your property is in danger, etc.?" and it appeared that the property proposed had been burnt a few months back by a fire originating from an unknown cause; that the applicant had been threatened by an intemperate man, to whose threats, however, no one paid any attention; that an anonymous letter threatening to burn the property had been received; that persons, supposed to be tramps, had been seen about the premises; and that the applicant had warned the watchman to be careful, and mentioned to him the letter: it was held the answer of the applicant, "No," to the above

¹ *Kelly v. Hochelega Mut. F. Ins. Co.*, 3 L. N. (Can.) 63.

² *McBride v. Republic F. Ins. Co.*, 30 Wis. 562.

³ *Keith v. Globe Ins. Co.*, 52 Ill. 518.

⁴ *Minogue v. Quebec F. Assur. Co.*, 1 Montreal S. C. (Can.) 417.

⁵ *Hart. Protec. Ins. Co. v. Harmer*, 2 Oh. St. 452.

⁶ *Beebe v. Hart. Co. Mut. F. Ins. Co.*, 25 Conn. 51.

⁷ *N. A. F. Ins. Co. v. Throop*, 22 Mich. 146; *Whittle v. Farmville Ins. Etc., Co.*, 3 Hughes, 421 (D. S. C.); *Campbell v. Victoria Mut. Ins. Co.*, 4 L. N. Can. 80; *Herbert v. Mercant. F. Ins. Co.*, 43 U. C. Q. B. 384.

⁸ 5 Ont. Ap. 596, overruling s. c. 27 Grant, Ch. (Can.) 121.

questions was unfair. The question of the materiality is for the jury.¹

540. In *Ross v. Bradshaw*,² Lord Mansfield is reported to have said, "where an insurance is upon a representation, every material circumstance should be mentioned; such as age, way of life, etc. But where there is a warranty, then nothing need be told; but it must, in general, be proved, if litigated, that the life was in fact a good life. The only question is, whether he was in a reasonably good state of health, and such a life as ought to be insured on common terms." And it has been subsequently asserted that no innocent misrepresentation or concealment by the insured will avoid where there is a warranty or condition, for the thing warranted is at the risk of the insured, and representations or disclosures might only weaken its effect.³ And where there is no warranty it has been held that the insured need only answer the specific questions in the application, but that he need not disclose what is not asked, though it may be material.⁴ It has also been held that where the insurer simply issues a policy without desiring any information, the presumption is that he has waived any desire to know about material facts, and relied upon his own knowledge in the matter.⁵ The suggestion may, however, be made in such a case, as to how far a non-disclosure would be held unimportant, if there were peculiar circumstances of risk attendant upon the thing proposed for insurance, as, for example, where a building is heated, or lighted, or a trade is carried on in it in a peculiarly dangerous manner.⁶ When the insured's answers are ambiguous, or not sufficiently full, whether representations or warranties, the insurer should require them to be made more specific, for if he issue a policy thereon without, he cannot afterwards complain of the want of fulness or ambiguity.⁷

¹ *N. A. F. Ins. Co. v. Throop*, 22 Mich. 146; *Gates v. Madison Co. Mut. Ins. Co.*, 5 N. Y. 468; *Rawls v. Amer. Mut. L. Ins. Co.*, 27 N. Y. 282.

² 1 Wm. Black, 312, more fully reported in *Marshall on Insurance*, 770 (Ed. 1808); *Park on Insurance*, 649. See also *Bulkley v. Protec. Ins. Co.*, 2 Paine, 82 (D. Conn.); *DeWolf v. N. Y. Firemen's Ins. Co.*, 20 John. (N. Y.) 214.

³ *Clark v. Mass. Ins. Co.*, 8 How. 248. See remarks of the Court in *Clark v. Mass. Ins. Co.*, *supra*.
⁴ *Penn Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92; *Dilleber v. Home L. Ins. Co.*, 69 N. Y. 256; *Lebanon Mut. Ins. Co. v. Kepler*, 106 Pa. St. 28; *Nicoll v. Am. Ins. Co.*, 3 W. & M. 529 (D. R. I.).

⁵ *Walden v. N. Y. Firemen's Ins. Co.*, 12 John. (N. Y.) 128.
⁶ *Boggs v. Amer. Ins. Co.*, 30 Mo.

And if the insurer issue a policy with the knowledge that a question propounded has not been answered, this waives the obligation to answer.¹ For, as was stated by Lord Mansfield in the well-known case of *Carter v. Boehm*,² "the insured need not mention what the underwriter waives being informed of."

541. Nor need the insured mention what the underwriter ought to know.³ Thus, the insurer is supposed to know facts of universal notoriety in the commercial world existing at the issue of the policy and appertaining to the risk,⁴ or public transactions, and the courses of nature and trade.⁵ But though a fact was at one time of common notoriety, as, for example, the fact that during the late Civil War in the United States the Confederate steam cruiser "The Georgia" was dismantled and sold in England as a trader, yet, if that fact is not present in the mind of the English underwriter, when he subsequently makes the insurance on the same vessel under the name of the "S. S. Georgia," as an English trader, he would not be liable on a capture of the vessel by a United States vessel of war.⁶ It was formerly ruled in England, or at least left to the jury to say, whether a circumstance of intelligence, inserted in Lloyd's lists, need be communicated to the underwriter.⁷ And in Massachusetts, it was said that although the officers of an insurance company may not, under all circumstances, be presumed to be acquainted with all the intelligence contained in the newspapers taken at their office, yet the general presumption is that they will examine with some care the items of marine intelligence, especially in relation to vessels belonging to their own port.⁸ And *quere* in Scotland.⁹ Such a rule would, however, impose a great burden on the underwriter, and in *Morrison v. Univ. M. Ins. Co.*,¹⁰ where the information, not disclosed by the broker, had appeared in Lloyd's list, which is a

¹ *Liberty Hall Ass'n v. Housatonic Mut. F. Ins. Co.*, 7 Gray (Mass.), 261; *Amer. L. Ins. Co. v. Mahone*, 56 Miss. 180; *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300; *Lorillard F. Ins. Co. v. McCulloch*, 21 Oh. St. 176; *Armenia Ins. Co. v. Paul*, 91 Pa. St. 520.

² 3 Burr. 1909.

³ *Carter v. Boehm*, 3 Burr. 1909.

⁴ *Bates v. Hewitt*, L. R. 2 Q. B. 595; *Md. & Phoenix Ins. Co. v. Bathurst*, 5 G. & J. 159.

⁵ *Hartshorne v. Un. Mut. Ins. Co.*, 36 N. Y. 172; *Kohne v. Ins. Co.*, 1 Wash. 158 (D. Pa.).

⁶ *Bates v. Hewitt*, L. R. 2 Q. B. 595.

⁷ *Friere v. Woodhouse*, 1 Holt, N. P. 572; *Foley v. Tabor*, 2 F. & F. 663.

⁸ *Green v. Merch. Ins. Co.*, 10 Pick. (Mass.) 402.

⁹ *Symers v. Glasgow M. Ins. Co.*, 19 Sc. Jur. 49.

¹⁰ L. R. 8 Exch. 40.

daily newspaper containing hundreds of entries relating to shipping in all parts of the world, and circulating among ship-owners, underwriters, and insurance brokers, the insurers being in point of fact subscribers to it, it was held that this did not entitle the broker to assume that the underwriter had a knowledge of the facts therein stated. It had been ruled that the mere knowledge of the underwriter will not excuse concealment, unless it was as full as the insured was bound to communicate.¹ And a second underwriter, where there are several policies, is not to be charged with the communication by the insured to the first one.² The insurer is also presumed to know the usual dangers and incidents to which the subject proposed for insurance is exposed.³ It has been held that the opinion of experts as to the materiality of a concealed fact, and how the insurers would be affected by it, are inadmissible.⁴

542. An agent of the insured taking out a policy is bound to disclose all he knows which is material.⁵ And the same rule is applicable in policies taken by one "for whom it may concern."⁶ And the agent's concealment will affect his principal, though the latter be ignorant of it.⁷ As insurances are very commonly procured through the agency of brokers, who sometimes unite the character of under agents of the insurer, it is not always clear whether such intermediary is the agent of the insured or of the insurer. Where a broker, or solicitor for insurance, who is not in the employ of the insurer, receives from the insured an application, and is thus clothed with an *indicium* of authority from the insured, he will be regarded as the latter's agent, whether he presents the proposal in person to the insurer or mediately through another.⁸ And even where the broker got

¹ *Snn Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485. *penter v. Amer. Ins. Co.*, 1 Story, 57 (D. R. I.).

² *Robertson v. Majoribanks*, 2 Starkie, N. P. 575; *Foley v. Tabor*, 2 F. & F. 663.

³ *Sims v. State Ins. Co.*, 47 Mo. 54.

⁴ *Durrell v. Bederley*, 1 Holt, N. P. 283. See *Hart. Protec. Ins. Co. v. Harmer*, 2 Oh. St. 452; *Quin v. Nat. Assur. Co.* 1 J. & Car. (Ir.) 317.

⁵ *Fitzherbert v. Mather*, 1 T. R. 12; *Edwards v. Footner*, 1 Camp. 530; *Bain v. Case*, 3 C. & P. 496; *Armour v. Transatlantic F. Ins. Co.*, 90 N. Y. 450; *Car-*

⁶ See *Augusta Ins., Etc., Co. v. Abbott*, 12 Md. 346; *Clement v. Phoenix Ins. Co.*, 6 Blatch. 481 (S. D. N. Y.); *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151.

⁷ *Armour v. Transatlantic F. Ins. Co.*, 90 N. Y. 450.

⁸ See *Liberty Hall Ass'n v. Housatonic Mut. F. Ins. Co.*, 7 Gray (Mass.), 261; *Armour v. Transatlantic F. Ins. Co.*, 90 N. Y. 450; *Carpenter v. Amer. Ins. Co.*, 1 Story, 57 (D. R. I.).

a commission for each policy he brought to the insurer, but was otherwise the agent of the insured, this fact would not affect the question of agency.¹ Though perhaps the possession of a blank policy by one assuming to act for the insurer company might raise the presumption that he was in fact the latter's agent.² If the policy is deposited by its owner after its issue with the insurer's agent for safe keeping, it has been held that the agent's subsequent misstatement was not ground for reformation on the part of the insured, as the agent had become that of the insured.³

543. An express warranty is the assertion of a fact or the undertaking to do an act, in the contract, upon the literal accuracy or performance of which the validity of the contract depends.⁴ If it is precedent and unperformed, the insurance does not attach; if subsequent and unperformed, it terminates it.⁵ No special form of words is necessary to constitute a warranty, and the word warrant need

¹ Penniston v. L. Ins. Co., 4 Bull. (Oh.) 935. 52 N. J. L. 455; Jennings v. Chenango Co. Mut. Ins. Co., 2 Den. (N. Y.) 75;
² Fame Ins. Co. v. Mann, 4 Brad. (Ill.) 485; Fame Ins. Co. v. Thomas, 10 Ib. 545. Snyder v. Farmers' Ins. Co., 13 Wend. (N. Y.) 92; Duncan v. Sun F. Ins. Co., 6 Ib. 488; Burritt v. Saratoga Co. Mut. F. Ins. Co., 5 Hill (N. Y.), 188; Ripley v. Aetna Ins. Co., 30 N. Y. 136; Higbie v. Guardian Mut. L. Ins. Co., 53 N. Y. 603; Edington v. Aetna Ins. Co., 100 Ib. 586; Pierce v. Empire L. Ins. Co., 62 Barb. (N. Y.) 636; Merwin v. Star F. Ins. Co., 7 Hun. (N. Y.) 659; Foot v. Aetna L. Ins. Co., 4 Daly (N. Y.), 285; Bancroft v. Home Benef. Ass'n, 22 J. & S. (N. Y.) 332; Conn. Mut. L. Ins. Co. v. Pyle, 44 Oh. St. 19; Frisbie v. Fayette Mut. Ins. Co. 27 Pa. St. 325; United Brethren Mut. Aid Soc. v. Kinter, 12 W. N. C. (Pa.) 76; E. Tex. F. Ins. Co. v. Brown, 82 Tex. 631; West Rockingham Mut. F. Ins. Co. v. Sheets, 26 Grat. (Va.) 854; Eddy St. Iron Foundry v. Hampden Stock, Etc., Ins. Co., 1 Cliff. 300 (D. R. I.); Davey v. Aetna L. Ins. Co., 20 Fed. R. 482 (D. N. J.). See also Hartigan v. Internat. L. Ass'n Soc., 8 L. C. L. 203.
³ De Hahn v. Hartley, 1 T. R. 343, 2 Ib. 186.

not be used, but words of affirmation or undertaking relating to the risk, and affecting its character or extent, upon which it is inferred the insurer contracts, will be sufficient to constitute a warranty.¹ When the contract is in writing, as is usual, the warranty must appear in the policy, or some paper which is, in suitable language, made a part of it.² And a policy under seal or deed poll may make the stipulations, in a paper not under seal, warranties.³ It does not follow that all stipulations on the face of the policy are necessarily warranties.⁴ Though it has been said they are so *prima facie*.⁵

544. A warranty need not be contained in the body of the policy, but it is sufficient if it appear on the face or margin.⁶ But statements *dehors* the policy, unless specially made part of it by appropriate language, are only representations.⁷ Thus an accompanying memorandum, not inserted in, nor annexed to, the policy was held not to control the contract.⁸ Neither does a detached memorandum

¹ Seybert v. Aetna L. Ins. Co., 4 Luz. Leg. Reg. (Pa.) 219; Tex. Banking & Ins. Co. v. Stone, 49 Tex. 4; Redman v. Hartf. F. Ins. Co., 47 Wis. 89; Co-op. L. Ass'n v. Leflore, 53 Miss. 1.

² See MacDonald v. Law Un. Ins. Co., L. R. 9 Q. B. 328; Mut. Ben. L. Ins. Co. v. Robertson, 59 Ill. 123; Mut. Benef. L. Ins. Co. v. Miller, 39 Ind. 475; Farmers' & Drovers' Ins. Co. v. Curry, 13 Bush (Ky.), 312; Ky. & Louisville Mut. Ins. Co. v. Southard, 8 B. Mon. (Ky.) 634; Co-op. L. Ass'n v. Leflore, 53 Miss. 1; Duncan v. Sun F. Ins. Co., 6 Wend. (N. Y.) 488.

³ Daniel v. Hudson River F. Ins. Co., 12 Cush. (Mass.) p. 423.

⁴ Campbell v. New Eng. Mut. L. Ins. Co., 98 Mass. 381; Planters' Ins. Co. v. Myers, 55 Miss. 479; Boardman v. N. H. Mut. F. Ins. Co., 20 N. H. 551.

⁵ Planters' Ins. Co. v. Myers, 55 Miss. 479; correcting the broader language used in Co-op. L. Ass'n v. Leflore, 53 Miss. 1.

⁶ Bean v. Stupart, 1 Dough. 11:

Kenyon v. Berthon, 1 Dough. 12, n; Puller v. Glover, 12 East, 123; De Hahn v. Hartley, 1 T. R. 343; 2 Ib. 186; McLaughlin v. Atlantic Mut. Ins. Co., 57 Me. 170; Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72; Patch v. Phoenix Mut. L. Ins. Co., 44 Vt. 481.

⁷ Mut. Ben. L. Ins. Co. v. Robertson, 59 Ill. 123; Miller v. Mut. Benef. L. Ins. Co., 31 Iowa, 216; Williams v. New Eng. Mut. F. Ins. Co., 31 Me. 219; Campbell v. New Eng. Mut. L. Ins. Co., 98 Mass. 381; Ring v. Phoenix Assur. Co., 145 Mass. 426; Price v. Phoenix Mut. L. Ins. Co., 17 Minn. 497; Planters' Ins. Co. v. Myers, 55 Miss. 479; Boardman v. N. H. Mut. F. Ins. Co., 20 N. H. 551; Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72; Callaghan v. Atlantic Ins. Co., 1 Ed. Ch. (N. Y.) 64; Owens v. Holland Purchase Ins. Co., 56 N. Y. 565; Burritt v. Saratoga Co. Mut. F. Ins. Co. 5 Hill (N. Y.), 188; Pierce v. Empire Ins. Co., 62 Barb. (N. Y.) 636.

⁸ Higginson v. Dall, 13 Mass. 96.

folded up with the policy.¹ Nor a memorandum wafered to the policy.²

545. What language is sufficient to make a paper a part of the policy is not easy to define. Obviously where the insurer's charter and by-laws are referred to and made a part of the contract, their language has the same effect as if inserted in the policy.³

Where conditions annexed to the policy are referred to and made a part of it no question can arise.⁴ In *Jefferson v. Cotheal*,⁵ it was stated that the same degree of strictness which is required to make the application a part of the policy, is not necessary with respect to annexed conditions, but that where the policy is accepted in reference to them they become a part of it. And in *Kensington Nat. Bk. v. Yerkes*,⁶ the reference that payment was to be made "in conformity to the conditions annexed" was held a warranty. In certain Courts there are *dicta* that conditions annexed to the policy, even if not referred to at all, are to be considered as a part of the policy, at least *primâ facie*.⁷ But in *Mut. Ins. Co. v. Rowland*,⁸ an indorsement on the back of the policy not therein referred to, was held not to bind. In *Richards v. Protec. Ins. Co.*,⁹ the reference was "this policy is made and accepted in reference to the conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto in all cases not herein provided for," and the conditions divided the risks into several classes, as more or less hazardous, and it was held

¹ *Pawson v. Ewer*, 1 Dough. 13, n; 20 Barb. (N. Y.) 468. See *Fitzgerald Ky. & Louisville Mut. Ins. Co. v. Southard*, 8 B. Mon. (Ky.) 634. *Mut. Relief Soc.*, 17 Dut. (Can.) 333; *Venner v. Sun L. Ins. Co.*, 17 Ib. 394.

² *Ib.*; *Goddard v. E. Tex. F. Ins. Co.*, 67 Tex. 69.

³ *Amer. Ins. Co. v. Henley*, 60 Ind. 515; *Tebbetts v. Hamilton Mut. Ins. Co.*, 1 Allen (Mass.), 305; *Marshall v. Columbian Mut. F. Ins. Co.*, 27 N. H. 157; *Mut. F. Ins. Co. v. Coatesville Shoe Factory*, 80 Pa. St. 407; *Susquehanna Mut. F. Ins. Co. v. Leavy*, 136 Pa. St. 500. See *City F. Ins. Co. v. Carrugie*, 41 Ga. 660.

⁴ *Deweese v. Manhat. Ins. Co.*, 34 N. J. L. 244; *Jennings v. Chenango Co. Mut. Ins. Co.*, 2 Den. (N. Y.) 75; N. Y. Cent. Ins. Co. v. Nat. Protec. Ins. Co.,

⁵ 7 Wend. (N. Y.) 72.

⁶ 86 Pa. St. 227.

⁷ See *Rafel v. Nashville M. & F. Ins. Co.*, 7 La. An. 244; *Snyder v. Farmers' Ins., Etc., Co.*, 13 Wend. (N. Y.) 92; *Roberts v. Chenango Co. Mut. Ins. Co.*, 3 Hill (N. Y.), 501; *Murdock v. Chenango Co. Mut. Ins. Co.*, 2 N. Y. 210; *Jube v. Brooklyn F. Ins. Co.*, 28 Barb. (N. Y.) 412; *Fire Ass'n v. Williamson*, 26 Pa. St. 196; *De Silver v. State Mut. Ins. Co.*, 38 Ib. 130.

⁸ 66 Md. 236.

⁹ 30 Me. 273.

that a statement by the insured that the subject belonged to one class was a warranty. In Massachusetts, in *Daniels v. Hudson River F. Ins. Co.*,¹ however, where the annexed conditions were referred to as in the preceding case, and one of them provided that if the insured shall make any representations or concealment, etc., mentioning a case which tended to increase the risk, there should be a forfeiture, it was held that the statements in the conditions were to be regarded as in a collateral document, and not warranties. In *Lee v. Howard F. Ins. Co.*,² the policy stipulated for a forfeiture if the building insured be used for a trade denominated "hazardous, etc.," or specified on the memorandum of special rates, in the terms and conditions annexed, etc., and further provided that the policy was accepted in reference to the annexed conditions, which were to be used and resorted to to explain the rights of the parties not otherwise provided for. One of them forfeited the policy for an increase of risk or a more hazardous use within the control of the insured, and a memorandum annexed of several classes of hazards *inter alia* demanded an extra rate for "special hazards." The premises were put to a use specified in the memorandum of special rates, and it was held an avoidance of the policy. For it violated the terms of the annexed memorandum; and as the annexed conditions were only to be used to explain the rights of the parties not otherwise provided for, they did not apply in this case, and, therefore, evidence to show the use did not increase the risk was inadmissible.

546. In order to make the application part of the policy, or the truthfulness of its statements warranted, it must be referred to in the policy for that purpose;³ for it is said a stipulation to that effect in the application alone is not sufficient.⁴ And a mere reference to the application is not sufficient, but the reference must be in appropriate language to make the application a part of the policy.⁵ But,

¹ 12 Cush. (Mass.) 416. See *Eclipse* 287; *Clemans v. Supreme Assembly, Ins. Co. v. Schoemer*, 2 Cin. S. C. R. 131 N. Y. 485. (Oh.) 474.

² 3 Gray (Mass.), 583. See also *Amer. Pop. L. Ins. Co. v. Day*, 39 N. J. L. 89; *Edington v. Mut. L. Ins. Co.*, 67 N. Y. 185.

³ *Miller v. Mut. Ben. L. Ins. Co.*, 31 Allen, 106 Ind. 593; *Co-op. L. Ass'n Iowa*, 216; *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 381; *Glutting v. Metropolitan L. Ins. Co.*, 50 N. J. L. 16 lb. 359.

⁴ *Presbyterian Mut. Assur. Fund v. Allen*, 106 Ind. 593; *Co-op. L. Ass'n v. Leflore*, 53 Miss. 1; *Amer. Pop. L. Ins. Co. v. Day*, 39 N. J. L. 89; *Burritt v. Saratoga Co. Mut. F. Ins. Co.*, 5

though the application becomes part of the express contract, it does not follow that all of its statements become warranties, but it depends on the language of the policy read in connection with that of the application, what force the statements in the application are intended to have, whether they are to be regarded as warranties, or as mere description, or perhaps as mere representations.¹ It is impossible to formulate a rule upon this general subject, for the cases are utterly irreconcilable, but a few suggestions and illustrations will be given.² Where the application *in totidem verbis* is made a part of the contract and its statements warranted, or appropriate language to that effect used, little difficulty can arise.³ The applica-

Hill (N. Y.), 188; Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72; Vilas v. N. Y. Cent. Ins. Co., 72 N. Y. 590; Merch. Ins. Co. v. Dwyer, 1 Pos. (Tex.) 441.

¹ See Anderson v. Fitzgerald, 4 H. L. C. 484; MacDonald v. Law Un. F. & L. Ins. Co., L. R. 9 Q. B. 328; Ala. Gold L. Ins. Co. v. Johnston, 80 Ala. 467; Phoenix Ins. Co. v. Benton, 87 Ind. 132; Mut. Benef. L. Ins. Co. v. Wise, 34 Md. 582; Campbell v. New Eng. Mut. L. Ins. Co., 98 Mass. 381; Price v. Phoenix Mut. L. Ins. Co., 17 Minn. 497; Amer. L. Ins. Co. v. Day, 39 N. J. L. 89; Owens v. Holland Purchase Ins. Co., 56 N. Y. 565; Roach v. Ky. Mut. Security Fund Co., 28 S. C. 431.

² See Glendale Woolen Co. v. Protec. Ins. Co., 21 Conn. 19; Hoffecker v. New Castle Co. Mut. Ins. Co., 5 Hous. (Del.) 101; Brown v. Mass. Mut. L. Ins. Co., 18 Ins. L. J. 208 (N. H.); Conover v. Mass. Mut. L. Ins. Co., 3 Dill. 217 (W. D. Mo.); Lee v. Guardian L. Ins. Co., 5 Big. L. & A. Cas. 18 (D. Cal.).

³ Ryan v. World Mut. L. Ins. Co., 41 Conn. 168; Edwards v. Farmers' Ins. Co. 74 Ill. 84; Cox v. Aetna Ins. Co., 29 Ind. 586; Mut. Benef. & Ins. Co. v. Miller, 39 Ind. 475; Phoenix Ins. Co. v. Benton, 87 Ind. 132; Farmers & Drovers' Ins. Co. v. Curry, 13 Bush (Ky.), 313;

Williams v. New Eng. Mut. F. Ins. Co., 31 Me. 219; Philbrook v. New Eng. Mut. F. Ins. Co., 37 Me. 137; Tebbetts v. Hamilton Mut. Ins. Co., 1 Allen, 305; Abbott v. Shawmut Mut. F. Ins. Co., 3 Ib. 213; Murphy v. People's Equitable Mut. F. Ins. Co., 7 Ib. 239; Amer. Ins. Co. v. Gilbert, 27 Mich. 429; State Ins. Co. v. Jordan, 24 Neb. 358; Glutting v. Metropol. L. Ins. Co., 50 N. J. L. 287; Carson v. Jersey City Ins. Co., 43 N. J. L. 300; Burritt v. Saratoga Co. Mut. F. Ins. Co., 5 Hill (N. Y.), 188; Jennings v. Shenango Mut. Ins. Co., 2 Den. (N. Y.) 75; Egan v. Mut. Ins. Co., 5 Ib. 326; Murdock v. Chenango Co. Mut. Ins. Co., 2 N. Y. 210; Ripley v. Aetna Ins. Co., 30 N. Y. 136; Le Roy v. Market F. Ins. Co., 39 N. Y. 90; First Nat. Bank v. Ins. Co. of N. A., 50 Ib. 45; Cushman v. U. S. L. Ins. Co., 63 Ib. 404; Steward v. Phoenix F. Ins. Co., 5 Hun. (N. Y.) 261; Kennedy v. St. Lawrence Co. Mut. Ins. Co., 10 Barb. (N. Y.) 285; Smith v. Empire Ins. Co., 25 Ib. 497; Shoemaker v. Glen's Falls Ins. Co., 60 Ib. 84; Ritsler v. World Mut. L. Ins. Co., 10 J. & S. (N. Y.) 409; Byers v. Farmers' Ins. Co., 35 Oh. St. 606; Aicher v. Metropolitan L. Ins. Co., 6 W. N. C. (Pa.) 332; South. Mut. Ins. Co. v. Yates, 28 Grat. (Va.) 585; Sawyer v. Dodge Co. Mut. Ins. Co., 37 Wis. 503;

tion need not, however, *in totidem verbis*, be made a part of the policy, but other language to the effect that the application is referred to as the basis of the contract, or that the policy is issued on the faith of the statements contained in the application, etc., have been held to make the application part of the express contract.¹ The following cases illustrate the construction the Courts have put upon the word reference to, etc.

547. In *Sheldon v. Hart. F. Ins. Co.*,² in the policy "reference is had to survey No. 83 on file in the office of the P. Co.," which latter consisted of answers to questions, some of which were intended to draw forth a minute description of the premises, and others to enable the insurers to estimate the risk: *Held*, the reference to the survey was for the purpose of incorporating all the survey into the policy. In *Commer. Ins. Co. v. Moninger*,³ after the description in the policy, there occurred the words, "For a more particular description of which see application and survey No. 37, on file at the A. office," and it was stated that the policy was accepted in reference to the conditions annexed which were made warranties. In the application the property was described, its estimated value and location stated, and then followed answers to minute questions in reference to the property and the house in which it was kept, which answers were made warranties. The undersigned agreed to accept the policy issued upon this application, "but if any untrue answer has been given to the foregoing interrogatories, whereby the company has been deceived as to the character of the risk," the policy was to be void. *Held* that the reference to the application was not such as to make it a part of the policy. In *Ky. & Louisville Mut. Ins. Co. v. Southward*,⁴ after the description of the property the policy ran, "reference being had to the application of the said A.,

Schumitsch v. Amer. Ins. Co., 48 Wis. 26; *Fourdrinier v. Hartford F. Ins. Co.*, 15 U. C. C. P. 403.

¹ See *Thomson v. Weems*, 9 Ap. Cas. 671; *Kelsey v. Universal L. Ins. Co.*, 25 Conn. 225; *Mut. Benef. L. Ins. Co. v. Miller*, 39 Ind. 475; *Mandego v. Centen. Mut. L. Ass'n*, 64 Iowa, 134; *Miles v. Conn. Mut. L. Ins. Co.*, 3 Gray (Mass.), 580; *Rose v. Eagle L. & Health Ins. Co.*, 6 Cush. (Mass.) 42; *Price v.*

Phoenix Mut. L. Ins. Co., 17 Minn. 497; *Gahagan v. Un. Mut. Ins. Co.*, 43 N. H. 176; *Wright v. Equit. L. Assur. Soc.*, 5 Big. L. & Ac. C. 401 (N. Y.); *Holterhoff v. Mut. Benef. L. Ins. Co.*, 3 Amer. L. Rec. 272 (Oh.); *Chrisman v. State Ins. Co.*, 16 Oreg. 283; *Marshall v. Times F. Ins. Co.*, 4 Allen (N. B.), 618.

² 22 Conn. 235.

³ 18 Ind. 352.

⁴ 8 B. Mon. (Ky.) 634.

and survey filled for a more particular description and as forming part of this policy." Held, this was not enough to make statements in the application warranties. In *Snyder v. Farmers' Ins. & Loan Co.*,¹ the survey described the building where the property was, and the policy was issued describing the property in the building occupied by the occupant, "more particularly described in the application and survey furnished by himself, No. 928, in the office of the insurance company;" and it was held the survey was only a representation or description, the reference to it being merely for identification. In *Weed v. Schenectady Ins. Co.*,² the policy made the application if referred to a part of the agreement and a warranty, and the insured on the trial of the suit against the insurer asked to have the policy corrected and conformed in a single instance to the application to which it did not refer, and it was contended by the insurer that this made the application a part of the policy. But it was held that this defence could not prevail, as it was not raised by the answer or an amendment to it, though the Court was doubtful whether, in any event, this defence would have been sufficient. In *City Ins. Co. v. Bricker*,³ a paper was drawn up in lead pencil, which purported to contain statements made by an insured and taken down by the agent of the insurance company at the office of the company at the time the policy was applied for. The application was signed by the insured, though on its face it was not to the insuring company, but drawn on the blank of another company and numbered. The policy made any application part of the policy and a warranty, and referred to by its number. Held that it was not a mere memorandum for the use of the agent, but a warranty. In *Lebanon Mut. Ins. Co. v. Losch*,⁴ the policy provided that the statements were warranties, and that the policy was accepted with reference to the annexed conditions "as well as the application and survey, which are to be resorted to in order to explain the rights of the parties in cases not otherwise provided for," and it was held that the policy did not in terms incorporate the application into the policy and that the statements thereof were, therefore, not warranties. In *Hart. Protec. Ins. Co. v. Harmer*,⁵ after a description

¹ 13 Wend. (N. Y.) 92; also 16 Ib. 481. See also *Delonguemare v. Tradesmen's Ins. Co.*, 2 Hall (N. Y.), 589.

² 7 Lans. (N. Y.) 452.

³ 91 Pa. St. 488.

⁴ 109 Ib. 100.

⁵ 2 Oh. St. 452.

of the property, the policy stipulated "for a more particular description of said premiums, see survey No. 74 furnished by the insured, which is hereby made a part of this policy," and declared it was made in reference to the annexed conditions to be resorted to to explain the contract, in all cases not otherwise specially provided for. These latter stated the application should give a minute description of the character of the building, that a false one should avoid a policy issued thereon, and that when the policy was issued on the survey and description it should be part of the policy and a warranty. *Semble*, the conditions only referred to the character of the buildings, which was a warranty, but that the reference for a more particular description in the policy was not sufficient to make all the statements in the application which did not concern the buildings, anything but representations. In *Vilas v. N. Y. Cent. Ins. Co.*,¹ upon the expiration of a policy in the A. Co., the agent, through whom the policy had been obtained, was directed by letter to insure the property in a good company. The old application, "No. X.," was on file with the agent, and he used it to obtain a policy which required a survey, description, and provided that certain representations should make a part of the policy and a warranty. And after a description it was stated "as per application No. X." Held, the only application was the letter to the agent, and the reference did not make the old application a part of the policy; but even if it was, the diagram on the back, showing the location, did not purport to be, nor was it shown to have been, made by the insured, and, therefore, he was not bound by it. In *Denny v. Conway Stock & Mut. F. Ins. Co.*,² a policy was "made and accepted in reference to the survey on file at this office," and renewed "upon condition that the application, upon which said policy was originally predicated shall continue valid and in full force." The policy had been issued upon an application, which was a paper containing a description of the property and certain representations and statements, and was headed with the name of another insurance company, and signed by its president, who had delivered the application to the defendant and procured the original policy and its renewal. There was no other evidence that the application was made with the authority or knowledge of the insured, and it was not signed by him. Held, the

¹ 72 N. Y. 590.

² 13 Gray (Mass.), 492.

insured was bound by the "survey," as that word could legitimately be construed, but not by the promissory statements as to the precautions to be taken against fire, etc.; nor by any of the president's representations, at the time of procuring the renewal, as to the amount of other insurance. Nor did the words of the renewal enlarge those of the policy when originally taken. In *Albion Lead Works v. Williamsburg F. Ins. Co.*,¹ the insured, with a plan in his hand, asked for insurance, and described the risk partly from the plan and partly from memory. The president of the company told him to send a copy of the plan and his statements and he would insure. A policy was issued making "the application, survey, plan, and description referred to a warranty and part of the policy," and described the buildings "as per plan." Held, the words of the policy did not refer to an oral application of the plan, but the intent was to insure according to the policy, and the plan was referred to only for description, and was a mere memorandum of the situation. In *Lycoming F. Ins. Co. v. Jackson*,² the application was signed by the initials of the insurance solicitor, and it did not appear that the insured ever heard of it. Held, not to bind him, nor was the receipt of the policy evidence that the insured had ever heard of it.

548. Where one accepts a policy of insurance in which it is expressly provided that the policy is made and accepted upon and in reference to the application filed in the office, he is thereby concluded from denying that the application is his, and he cannot set up that it was made by an agent employed by him to procure insurance upon his property, but without authority to bind him by representations in the application.³

549. *Anderson v. Fitzgerald*,⁴ arose upon the construction of certain language of applications which had been made parts of the contract; and it has been asserted that this case introduced the rule that a representation may be made material by contract, and yet not be a warranty; and that therefore not a literal, but only a substantial compliance is demanded. The proposal concluded with the declaration that it was the basis of the contract, and that if there should be any fraudulent concealment or untrue allegations

¹ 2 Fed. 479 (D. Mass.).

² *Draper v. Charter Oak F. Ins. Co.*,

³ 83 Ill. 302. See also *LeRoy v. 2 Allen (Mass.)*, 569.

Park F. Ins. Co., 39 N. Y. 56.

⁴ 4 H. L. C. 484.

contained therein, or any circumstance material to the insurance should not have been fully communicated to the company, or if there should have been any fraud or misstatement, the policy should be forfeited. The policy mentioned previous warranties, but the subject in dispute was not among them. It also stipulated that "if anything so warranted shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or any false statements made to the company in or about the obtaining or effecting of this insurance," there shall be a forfeiture. Several answers in the proposal were untrue in fact, and it was held that the answers in the application being made material, it was error in the lower Court to have left it to the jury to say whether they were material or not, the only question for the jury to decide being their truth. Parke, B., said, "The question does not appear to us to turn upon the well-known distinction between warranties and representations laid down by Lord Mansfield, nor upon the point whether the declaration above mentioned was either a part of the contract binding between the parties independent of the policy or meant to be referred to by it. The proviso is clearly a part of the express contract between the parties, and on the non-compliance with the condition stated in the proviso the policy is unquestionably void. It is simply a question of the construction of the proviso itself." This case simply decided that when representations are made material by an express contract their materiality cannot be questioned, but only their truth; but the Judges expressly avoided deciding the question whether such material statements should be construed as representations or conditions, that is, whether they must be literally true or only substantially so, whether they were precedent, or that the insurer should have the burden of proving them false.

550. In *Campbell v. New England Mut. L. Ins. Co.*,¹ in the application A. proposed to insure his life, "and with that view and as the basis of such insurance, makes the following statements," and answered categorically certain questions as to certain diseases, and signed the paper, which concluded with the statement that "the foregoing are full, fair, and true answers to the questions proposed." A policy issued *inter alia*, "upon the following condi-

¹ 98 Mass. 381.

tions," "that if the statements made by, or in behalf of, or with the knowledge of, or in the negotiations for, this contract, shall be found in any respect untrue," then this policy shall be void. The trial Court instructed the jury that if the statements in the application were materially untrue, the policy was avoided, but "that an untrue statement innocently made in regard to a latent disease of which the applicant was unconscious would not avoid the policy," and declined to instruct the jury that the truth of the statement was a condition precedent, or that the burden was on the plaintiff to show their truth. On appeal, the last instruction as to misrepresentations of a latent disease innocently made was reversed. And the Court remarked that it was inclined to hold at least, if it did not actually hold, that the application was not a part of the contract, as not being sufficiently referred to in the policy; as the policy did not refer to any paper, *eo nomine*, and the wording applied to oral as well as written representations, and the fact that the application stipulated that its statements were to constitute the basis of the contract, did not change them into warranties, as the two papers could not be construed together as constituting parts of the express contract. But even if the application could properly be resorted to for aid in the construction, it contained no agreement and no words to indicate that its statements were to be taken as warranties, nor that they were to form part of the contract, though the word "statements" was used in both instruments, for the papers generally by their language seemed to indicate representations rather than warranties. And finally the fact that the policy used the general word "conditions" was immaterial, as a technical word does not always carry its legal consequences. The "statements" were therefore not warranties, nor precedent, and need only be proven substantially true if material, and the materiality was for the jury. After another verdict on a rule for a new trial the Court *in banc* said that while abiding by their former ruling, a new point had arisen on the second trial, which was whether the statements must be shown to be material or whether their truth only was for the jury, where the insured had made them part of the contract and material; and it was held the answers were representations made material by the contract, but that not being warranties they need only be substantially true, and *Anderson v. Fitzgerald*¹ was

¹ *Supra*.

cited as authority and with approval. *Campbell v. New Eng. Mut. L. Ins. Co.* case has been cited with approval, and the principles for the last judgment followed in *Price v. Phoenix Mut. L. Ins. Co.*,¹ *Miller v. Mut. Ben. L. Ins. Co.*,² *Amer. L. Ins. Co. v. Day*,³ *Mut. Benef. Popular L. Ins. Co. v. Wise*.⁴

551. The principles laid down in *Moulton v. Amer. L. Ins. Co.*,⁵ appear to differ very materially in the construction of the policy clauses from most of the above cases. In this case the application contained unqualified answers to categorical questions, and it "declared and warranted that the above are fair and true . . . and that this application shall form part of the contract of insurance, and that if there be in any of the answers herein made any untrue or evasive statements, or any misrepresentations or concealment of facts, then," the policy was to be void. The policy recited that it was "in consideration of the representations made to them in the application," and that "if the representations and answers made to this company in the application for this policy, upon the full faith of which it is issued, shall be found to be untrue in any respect, or that there has been any concealment of facts, then" a forfeiture of the policy took place. In point of fact some of the answers were untrue as to certain diseases. Held, the application was part of the policy, but the answers were representations; that the word "warranted" in the application was not decisive; that the phraseology of the clauses was obscure; that if the insured had acted honestly, his untrue answers would not defeat the policy, even though positive representations, and that the jury should judge of his intent, and the lower Court was reversed.

It has been held that where the policy makes "representations"

¹ 17 Minn. 497.

² 31 Iowa, 216.

³ 39 N. J. L. 89.

⁴ 34 Md. 582. See also *Mut. Benef. L. Ins. Co. v. Wise*, 34 Md. 582; *Campbell v. New Eng. Mut. L. Ins. Co.*, 98 Mass. 381; *McCoy v. Metropolitan L. Ins. Co.*, 133 Mass. 82; *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497; *Co-op. Ass'n v. Leflore*, 53 Miss. 1; *Whitmore v. Supreme Lodge*, 100 Mo. 36; *Roach v.*

Ky. Mut. Security Fund Co., 28 S. C. 431; *Mullin v. Vt. Mut. F. Ins. Co.*, 54 Vt. 223; *Conever v. Mass. Mut. L. Ins. Co.*, 3 Dill. 217 (W. D. Mo.); *Lee v. Guardian L. Ins. Co.*, 5 Big. L. & A. Cas. 18 (D. Cal.); *Eddy St. Iron Foundry v. Hampden Stock, Etc., Co.*, 1 Clif. 300 (D. R. I.); *Cheever v. Un. Cent. L. Ins. Co.*, 5 Ins. L. J. 159 (Oh.).

⁵ 111 U. S. 335.

a part of the contract, verbal as well as written representations are intended.¹

552. In *McDonald v. Law Un. Ins. Co.*,² the point was taken that the issue of the policy on the faith of the statements in the application, which, however, was not specifically made the basis of the contract, did not have the same effect as if such a provision had been inserted, but the Court were of the opinion that there was nothing in the point. And in the United States, the general impression seems to be that the statements in the application may be embodied in the policy by the terms of the policy alone.³

553. Where the application is made a part of the express contract, only such of it as is referred to, and is technically a part of it, would be embodied in the contract. For instance, in *Owens v. Holland Purchase Ins. Co.*,⁴ where the applicant covenanted that the valuation, description, and survey were true and correct, and were submitted as his warranty and the basis of the insurance, and the only reference to them in the policy was "on the following property as described in application," that portion only of the application describing the property was held to be adopted in the policy, and that there was no warranty therefore as to the value. It has also been held that indorsements on the back of the application which are not called to the attention of the insured do not form part of it.⁵ Where all the "insured's statements and answers, as well as those to be made to the society's medical examiner, are warranted to be true" in the application, it was held that this warranted the answers to be true, but not that the medical examiner should correctly transcribe them; and, therefore, where the applicant did not see nor sign the medical examiner's report or examination, he is not estopped from denying their correctness.⁶ A distinction has been made between the insured signing at the beginning of the medical examiner's report and at the end, it being said that the former is rather for identification than an affirmation that the

¹ *Hoose v. Prescott Ins. Co.*, 84 Mich. 309. 70; *Lee v. Guardian L. Ins. Co.*, 5 Big L. & Ap. Cas. 18 (D. Cal.).

² L. R. 9 Q. B. 328.

³ 56 N. Y. 565.

⁴ See *Sheldon v. Hartford F. Ins. Co.*, 22 Conn. 235; *Royal Templars v. Curd*, 111 Ill. 284; *Draper v. Charter Oak F. Ins. Co.*, 2 Allen (Mass.) 569; *Bobbitt v. Liv. & Lond. & Globe Ins. Co.*, 66 N. C.

⁵ See *Unit. Breth. Mut. Aid Soc. v. Kinter*, 12 W. N. C. (Pa.) 76; *Cookburn v. Brit. Amer. Assur. Co.*, 19 Ont. R. 245. ⁶ *Equit. L. Ins. Co. v. Hazlewood*, 75 Tex. 338.

transcription by the medical examiner of the insured's answers is correct.¹ A letter in answer to a question of the insurer as to the relation to the life in a life policy, after the application, has been held not to form a part of it.²

554. In Massachusetts, the Act of 1861, c. 152, provided "in all insurances against losses by fire the conditions of the insurance shall be stated in the body of the policy, and neither the application of the insured, nor the by-laws of the company, as such, shall be considered as a warranty, or part of the contract." There was an express condition in the body of a policy that the application should contain a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk, and it was held valid, for the use of the words "as such" in the Act implied it was not intended to preclude a reference in the policy to the application, and the explicitness of the reference in the policy would be the test of the validity of the condition.³ The Act of 1864, c. 196, required that "in all insurances against loss by fire made by companies chartered, or doing business in this Commonwealth, the conditions of the insurance shall be stated in the body of the policy, and neither the application of the insured nor the by-laws of the company shall be considered as a warranty, or a part of the contract, except so far as they are incorporated in full in the policy, and so appear on its face before the signatures of its officers." The conditions of the policy must, therefore, be substantially stated in the body of the policy.⁴ And a clause in the body of the policy that proofs shall be made "in accordance with the conditions of this policy," is not sufficient to make a condition indorsed on the policy part of the policy.⁵ But if on the face of the policy the amount of the loss is stated to be payable "within sixty days after due notice and proof thereof, made by the insured in conformity to the con-

¹ *Equit. L. Ins. Co. v. Hazlewood*, 75 Tex. 338.

² *Mace v. Provident L. Ass'n*, 101 N. C. 122.

³ *Barre Boot Co. v. Milford Mut. F. Ins. Co.*, 7 Allen (Mass.), 42. See also *Campbell v. Charter Oak F. & M. Ins. Co.*, 7 Ib. 45, note.

⁴ See *East. R. R. Co. v. Relief F. Ins.*

Co., 98 Mass. 420; *Wheeler v. Watertown F. Ins. Co.*, 10 Ins. L. J. 354

(Mass.); *Luce v. Dorchester Mut. F. Ins. Co.*, 105 Mass. 297; *Mullaney v. Nat. F. & M. Ins. Co.*, 118 Ib. 393; *Taylor v. Aetna Ins. Co.*, 120 Ib. 254.

⁵ *Mullaney v. Nat. F. & M. Ins. Co.*, 118 Mass. 392.

ditions annexed to this policy," such notice and proof **must** be made in accordance with the details of a condition printed on a subsequent page of the policy and after signatures of the insurers.¹ But the provisions of the statute as to the incorporation of by-laws in the face of the policy does not apply to the obligations of the insured as a member of a mutual company, and by-laws relating to the duties and obligations of members are not within the Act.²

555. In Canada, various statutes have been passed regulating the conditions that the insurer may assert in a policy, as well as their method of assertion.³ The Act of 36 Vict., c. 44, was held to apply to mutual companies whether on the mutual or on the mutual and cash plans.⁴ And the uniform conditions Act of 39 Vict., c. 24 (R. S. Ont. 162), was held not to repeal this Act, and not to apply to mutual companies.⁵ It was decided by the Privy Council, in *Cit. Ins. Co. v. Parsons*,⁶ that the latter Act intended that no special conditions of the insurer shall avail against the statutory ones, but that the latter are alone to be resorted to, notwithstanding others are inserted, unless such are indicated as variations as prescribed by the Act; and that the penalty for not observing this method is, that the policy is not without any conditions, but becomes subject to the statutory conditions whether printed or not.

The statutes of Iowa,⁷ require the application or representations of the insured to be attached to the policy, if made part of the contract, or referred to in it, in order that the insurer may offer them in evidence or rely on them as a defence,⁸ and this Act extends to mutual assessment companies.⁹ In Pennsylvania, a similar statute¹⁰ requires the application or rules, etc., referred to in the policies of

¹ *Eastern Railroad Co. v. Relief F. Ins. Co.*, 98 Mass. 420.

² *Commonwealth v. Mass. Mut. F. Ins. Co.*, 112 Mass. 116.

³ See *ante*, § 505.

⁴ *Fair v. Niagara District Mut. F. Ins. Co.*, 26 U. C. C. P. 398.

⁵ *Mut. F. Ins. Co. v. Frey*, 5 Duv. (Can.) 82; *Ballagh v. Royal Mut. F. Ins. Co.*, 5 Ont. Ap. 87.

⁶ 7 Ap. Cas., reversing *Parsons v. Cit. Ins. Co.*, 4 Ont. Ap. 96; *McIntyre v. Nat. Ins. Co.*, 5 Ont. Ap. 580; *Par-*

sons v. Queen Ins. Co., 4 Ont. Ap. 103.

See also *Sauvey v. Isolated Risk Ins. Co.*, 16 Can. L. J. 30; *Frey v. Mut. F. Ins. Co.*, 43 U. C. Q. B. 102; *Devlin v. Queen Ins. Co.*, 46 U. C. Q. B. 611.

⁷ Iowa Laws, 1880, c. 211, s. 2.

⁸ *Lewis v. Burlington Ins. Co.*, 71 Iowa, 97; *McConnell v. Iowa Mut. Ass'n*, 79 Ib. 757.

⁹ *Cook v. Federal L. Ins. Co.*, 74 Iowa, 746.

¹⁰ Act of May 11, 1881, P. L. 20.

life and fire companies to be attached to the policy in order to be received in evidence or to constitute a part of the contract.¹

556. It has been held, where there was a condition that the insured should state incumbrances, or his title, etc., in the application, but the latter did not contain any questions about the matter, that the omission to do so did not relieve the insurer.²

Where the policy is issued without any prior application, though a reference is made in the policy to one, the policy alone represents the bargain of the parties.³ And a subsequent paper cannot alter the terms of the original agreement unless it was specially agreed it should.⁴ It was held in *Le Roy v. Park Ins. Co.*,⁵ that the sending of a policy, with a blank survey to be filled out, which was returned without any condition or qualification, completes the contract, as there was nothing said as to its being conditional on the filling up or sending back the survey. But where a first policy was issued on an application which was agreed to contain a true description, etc., and which contained a denial of an incumbrance, and later a new policy, owing to a reduction of premium, was issued on the same property in the same amount, without any question asked as to an incumbrance, it was held that the presumption was that the latter policy was based on the facts in the former as to the general state of the title and property, and that the insured could not recover.⁶

In *Whittan v. Phoenix Ins. Co.*,⁷ after taking out one policy, the insured applied for a second for \$2000 additional, and showed the former policy. The agent, instead of asking for a formal application, made out an informal application, unsigned by the applicant, in which, in a column, he added "Diagram," which showed that the risk he inserted was the same as in the old policy, which had been numbered, and it was held not enough to show that the second policy was issued on the representation of the first as to a watchman.

¹ *Imp. F. Ins. Co. v. Dunham*, 117 Pa. St. 460. See *post*, § 1232. *change Mut. Ins. Co.*, 12 Gray (Mass.), 266; *O'Brien v. Oh. Ins. Co.*, 52 Mich. 131; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454.

² *Dohn v. Farmers' Joint Stock Ins. Co.*, 5 Lans. (N. Y.) 275. See also *O'Neill v. Ottawa Agricult. Ins. Co.*, 15 Can. L. J. 207. But see *Ross v. Cit. Ins. Co.*, 3 P. & B. (N. B.) 126.

³ *West Assur. Co. v. Mason*, 5 Brad. (Ill.) 141. *Commw. v. Hide & Leather Ins. Co.*, 112 Mass. 136; *Blake v. Ex-*

⁴ *Le Roy v. Park F. Ins. Co.*, 39 N. Y. 56.

⁵ 39 N. Y. 56.

⁶ *Martin v. Home Ins. Co.*, 20 U. C. C. P. 447.

⁷ 28 U. C. C. P. 53.

557. A warranty must be strictly or literally complied with, for the very meaning of the word precludes all questions as to substantial compliance.¹ In *Hoffman v. Supreme Council*,² the word "strictly" was considered as synonymous with the word "essentially," in a Judge's charge. A warranty in insurance is in the nature of a condition precedent;³ and must not be confused with a warranty in the sales of chattels which is collateral to the express object of the bargain.⁴ The burden of proof of performance is, therefore, on the insured.⁵ Though, where there are a number of

¹ *DeHahn v. Hartley*, 1 T. R. 343; Co., 76 Cal. 415; *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553; 2 Ib. 186; *Pawson v. Watson, Cowp.* 785; *Fowkes v. Manchester & Lond. Assur., Etc., Ass'n.* 3 B. & S. 917; *Newcastle F. Ins. Co. v. MacMorran*, 3 Dow. 255; *Glendale Woolen Co. v. Protec. Ins. Co.*, 21 Conn. 19; *Phoenix Ins. Co. v. Benton*, 87 Ind. 132; *Hoose v. Prescott Ins. Co.*, 84 Mich. 309; *Healey v. Imperial F. Ins. Co.*, 5 Nev. 268; *LeRoy v. Market F. Ins. Co.*, 39 N. Y. 90; *Trench v. Chenango Co. Mut. Ins. Co.*, 7 Hill (N. Y.), 122; *Cushman v. U. S. L. Ins. Co.*, 4 Hun. (N. Y.) 783; *West. Farmers' Mut. Ins. Co. v. Miller*, 1 Handy (Oh.), 325; *Buford v. N. Y. L. Ins. Co.*, 5 Oreg. 334; *McClure v. Watertown F. Ins. Co.*, 90 Pa. St. 277; *Donnald v. Piedmont & Arlington L. Ins. Co.*, 2 Ins. L. J. 738 (S. C.); *South. L. Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606; *Equit. L. Ins. Co. v. Hazlewood*, 75 Tex. 338; *Watertown F. Ins. Co. v. Cherry*, 84 Va. 72; *Carpenter v. Providence Wash. Ins. Co.*, 16 Pet. 495; *Nicoll v. Amer. Ins. Co.*, 3 W. & M. 529 (D. R. I.); *Eddy St. Iron Foundry v. Hampden Stock, Etc., Ins. Co.*, 1 Cliff. 300 (D. R. I.). See, however, *Springfield F. & M. Ins. Co. v. McLimans*, 28 Neb. 846.

² 35 Fed. R. 252 (E. D. Va.).

³ *Behn v. Burness*, 3 B. & S. 751; *DeHahn v. Hartley*, 1 T. R. 343; *Ala. Gold. L. Ins. Co. v. Johnston*, 80 Ala. 467; *Wheaton v. N. Brit. Mercan. Ins.*

Co., 76 Cal. 415; *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553; *Mut. Benef. L. Ins. Co. v. Robertson*, 59 Ill. 123; *Ill. Mut. F. Ins. Co. v. Marseilles Mfg. Co.*, 1 Gilman (Ill.), 236; *Dwelling-House Ins. Co. v. Reynolds*, 41 Ill. Ap. 427; *Behler v. German Mut. F. Ins. Co.*, 68 Ind. 347, 350; *Phoenix Ins. Co. v. Benton*, 87 Ind. 132; *Richards v. Protec. Ins. Co.*, 30 Me. 273; *Ætna Ins. Co. v. Grube*, 6 Minn. 82; *Brooks v. Standard F. Ins. Co.*, 11 Mo. Ap. 349; *Boardman v. N. H. Mut. F. Ins. Co.*, 20 N. H. 551; *Farmers' Ins. & Loan Co. v. Snyder*, 16 Wend. (N. Y.) 481; *Jennings v. Chenango Co. Mut. Ins. Co.*, 2 Denio (N. Y.), 75; *O'Neil v. Buffalo F. Ins. Co.*, 3 N. Y. 122; *West. Farmers' Mut. Ins. Co. v. Miller*, 1 Handy (Oh.), 325; *Buford v. N. Y. L. Ins. Co.*, 5 Oreg. 334; *City Ins. Co. v. Power*, 19 Pitts. L. J. 113; *Dial v. Val. Mut. L. Ass'n*, 29 S. C. 560; *Goddard v. E. Tex. F. Ins. Co.*, 67 Tex., 69; *Lynchburg F. Ins. Co. v. West*, 76 Va. 575; *James v. Lycoming Ins. Co.*, 4 Cliff. 272 (D. Mass.); *Anderson v. St. Louis Mut. L. Ins. Co.*, 1 Flip. 559 (D. W. Tenn.).

⁴ Biddle on Warranties, sec. 1 -

⁵ *Kelsey v. Univ. L. Ins. Co.*, 35 Conn. 225; *Miller v. Mut. Benef. L. Ins. Co.*, 31 Iowa, 216; *Campbell v. New Eng. Mut. L. Ins. Co.*, 98 Mass. 381; *McLoon v. Commercial Mut. L.*

warranties in the policy, certain Courts have held for reasons of convenience, or for some other such reason, that the insurer must affirmatively show non-compliance.¹

It is, strictly speaking, perfectly immaterial for what purpose a warranty is introduced into a policy.² And whether material or not to the risk, if unperformed, the contract is broken.³ In those

Ins. Co., 100 Ib. 472; *Cory v. Boylston F. & M. Ins. Co.*, 107 Ib. 140; *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497; *Healey v. Imperial F. Ins. Co.*, 5 Nev. 268; *Trenton Mut. L. Ins. Co. v. Johnson*, 4 Zab. (N. J.) 576; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72; *Bobbitt v. Liv. & Lond. & Globe Ins. Co.*, 66 N. C. 70; *Wilson v. Hampden F. Ins. Co.*, 4 R. I. 159; *Pelican Ins. Co. v. Troy Co-operative Ass'n*, 77 Tex. 225; *Bidwell v. Conn. Mut. L. Ins. Co.*, 3 Saw. 261 (D. Cal.).

¹ See *Continen. L. Ins. Co. v. Rogers*, 119 Ill. 474; *John Hancock Mut. L. Ins. Co. v. Daly*, 65 Ind. 6; *N. W. Mut. L. Ins. Co. v. Hazelett*, 105 Ib. 212; *Nat. Benef. Ass'n v. Grauman*, 107 Ib. 288; *Grangers' L. Ins. Co. v. Brown*, 57 Miss. 308; *Van Valkenburgh v. Amer. Pop. L. Ins. Co.*, 70 N. Y. 605; *Horton v. Equitable L. Assur. Soc.*, 3 Alb. L. J. (N. Y.) 233; *Roach v. Ky. Mut. Security Fund Co.*, 28 S. C. 431; *Wright v. Hartf. F. Ins. Co.*, 36 Wis. 522; *Redman v. Aetna Ins. Co.*, 49 Wis. 431; *Piedmont & Arlington L. Ins. Co. v. Ewing*, 92 U. S. 377; *Swick v. Home Ins. Co.*, 2 Dill. 160 (E. D. Mo.); *Holabird v. Ins. Co.*, 2 Ib. 166, n; *Brockway v. Mut. Benef. L. Ins. Co.*, 9 Fed. R. 249 (W. D. Pa.); *Whittle v. Farmville Ins., Etc., Co.*, 3 Hughes, 421 (D. S. C.); *Sinclair v. Phoenix Mut. Ins. Co.*, 9 Ins. L. J. 523 (D. Minn.); *Piedmont & Arlington L. Ins. Co. v. Ewing*, 92 U. S. 377. See post, §§ 1247-9.

² *DeHahn v. Hartley*, 1 T. R. 343.

³ *Thomson v. Weemms*, 9 Ap. Cas. 671; *Anderson v. Fitzgerald*, 4 H. L.

C. 484; *Ala. Gold L. Ins. Co. v. Johnston*, 80 Ala. 467; *Fame Ins. Co. v. Thomas*, 10 Brad. (Ill.) 545; 108 Ill. 91; *Grange Mill Co. v. West Assur. Co.*, 118 Ill. 396; *Continen. L. Ins. Co. v. Rogers*, 119 Ill. 474; *Witherell v. Me. Ins. Co.*, 49 Me. 200; *Mut. Benef. L. Ins. Co. v. Wise*, 34 Md. 582; *Miles v. Conn. Mut. L. Ins. Co.*, 3 Gray (Mass.), 580; *Van Buren v. St. Joseph Co. Vil. F. Ins. Co.*, 28 Mich. 398; *Co-op. Ass'n v. Leflore*, 53 Miss. 1; *Gerhauser v. North Brit. & Merc. Ins. Co.*, 7 Nev. 174; *Duncan v. Sun F. Ins. Co.*, 6 Wend. (N. Y.) 488; *Dwight v. Germania L. Ins. Co.*, 103 N. Y. 341; *Mead v. Northwest. Ins. Co.*, 7 N. Y. 530; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; *Le Roy v. Market F. Ins. Co.*, 39 Ib. 90; *Higbie v. Guardian Mut. L. Ins. Co.*, 53 Ib. 603; *Bartean v. Phoenix Mut. L. Ins. Co.*, 67 Ib. 595; *Shoemaker v. Glens Falls Ins. Co.*, 60 Barb. (N. Y.) 84; *Pierce v. Empire Ins. Co.*, 62 Ib. 636; *Chrisman v. State Ins. Co.*, 16 Oreg. 263; *State Mut. F. Ins. Co. v. Arthur*, 30 Pa. St. 315; *United Breth. Mut. Aid Soc. v. Kinter*, 12 W. N. C. (Pa.) 76; *Wilson v. Conway F. Ins. Co.*, 4 R. I. 141; *South L. Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 607; *Boyd v. Ins. Co.*, 90 Tenn. 212; *Schwarzbach v. Oh. Val. Protec. Un.*, 25 W. Va. 622; *Aetna Ins. Co. v. France*, 91 U. S. 510; *Eddy St. Foundry v. Hampden Stock, Etc., Ins. Co.*, 1 Cliff, 300 (D. R. I.); *Trefz v. Knickerbocker L. Ins. Co.*, 6 Ins. L. J. 850 (D. N. J.); *Schultz v. Mut. L. Ins. Co.*, 6 Fed. R. 672 (S. D. N. Y.); *Davey v. Aetna L. Ins. Co.*, 20

cases which affirm the principles laid down in *Campbell v. New Eng. Mut. L. Ins. Co.*,¹ it is suggested that the materiality would not be for the jury, but only the question of substantial compliance.²

558. Under the Code in Georgia, to render the contract void for any misstatement there must be materiality.³ In California, the Code may possibly make a survey annexed and referred to as a warranty, a representation.⁴ In Kentucky, by the Act of Feb. 4, 1874, all statements and description in any application or policy shall be deemed representations and not warranties, nor shall any representations, unless material or fraudulent, prevent a recovery on the policy.⁵ In Maine, under the Act of 1862, c. 115, re-enacted in 1871, c. 49, sec. 19, "any misrepresentation of the title or interest of the insured . . . unless material and fraudulent," shall not prevent his recovery.⁶ And an overvaluation to avoid must materially increase the risk or contribute to the loss.⁷ And the question is not what the company, but what the jury may think is material.⁸ The effect of the Massachusetts Public Statutes, c. 119, sec. 139, is that an innocent misrepresentation is deemed material if the risk is thereby increased.⁹ In Missouri, the Act of March 23, 1874, provides that no misrepresentations made in obtaining a life policy shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due, and the question of materiality is for the jury, and it was held by the Federal Court, that this Act included warranties as well as to representations, and that the provisions of a policy inconsistent with the Act

Ib. (D. N. I.); *Nicoll v. Amer. Ins. Co.*, 3 W. & M. 529 (D. R. J.); *Marshall v. Times F. Ins. Co.*, 4 Allen (N. B.) 618; *Venner v. Sun L. Ins. Co.*, 17 Duv. (Can.) 394.

¹ 98 Mass. 381. See *supra*, § 550.

² See *Campbell v. New Eng. Mut. L. Ins. Co.*, 98 Mass. 381; *Miller v. Mut. Benef. L. Ins. Co.*, 31 Iowa, 216; *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497; *Co-op. L. Ass'n v. Leflore*, 53 Miss. 1; *Hart. Protec. Ins. Co. v. Harmer*, 2 Oh. St. 452.

³ *Mobile F. Depart. Ins. Co. v. Miller*, 58 Ga. 420; *Mobile F. Depart. Ins.*

Co. v. Coleman, 58 Ib. 251; *South. L. Ins. Co. v. Wilkinson*, 53 Ib. 535.

⁴ *Rankin v. Amazon Ins. Co.*, 89 Cal. 203.

⁵ *Germania Ins. Co. v. Rudwig*, 80 Ky. 223; *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330.

⁶ *Bellatty v. Thomaston Mut. F. Ins. Co.*, 61 Me. 414; *Thayer v. Providence Wash. Ins. Co.*, 70 Ib. 531.

⁷ *Thayer v. Providence Wash. Ins. Co.*, 70 Me. 531.

⁸ *Ib.*

⁹ *Ring v. Phoenix Assur. Co.*, 145 Mass. 426.

is void.¹ In Pennsylvania, a warranty in the application must be material to avoid.² And the statute was held to apply to a contract made in Maryland, on which suit was brought by a Virginian in Maryland, on a policy issued by a Pennsylvania company.³ In the Province of Ontario, the statutory condition requires that a misrepresentation shall be material to avoid the policy.⁴ And apparently in Lower Canada, a positive answer in an application which is made the basis of the contract, to avoid, must be material or fraudulent.⁵

559. It is scarcely necessary to add that the want of knowledge on the part of the insured as to the fact he misrepresents is quite immaterial.⁶ In *MacDonald v. Law Un. F. Ins. Co.*,⁷ the plaintiff, who had effected a policy on A.'s life, declared "that the above particulars are truly set forth," and the policy provided "that if the declaration under the hand of the plaintiff delivered at the defendant's office, as the basis of the insurance, is not in every respect true, or if there has been any misrepresentations, concealment, or untrue averment, or if there has been any untrue averment in treating for the said insurance . . . then the insurance shall be void." In point of fact some of the statements were untrue, though not to the knowledge of the plaintiff, and it was held that the plaintiff's knowledge as to the untruth was immaterial, and that an untruthful answer avoided the insurance, though not morally or culpably false. In *Chrisman v. State Ins. Co.*,⁸ where the application was made part of the policy and a warranty, and a further clause provided that "any false or untrue answers or statements material

¹ *White v. Conn. Mut. L. Ins. Co.*, 4 Thomaston Mut. Ins. Co., 20 Me. 125; Dill. 177 (W. D. Mo.).

² *Fidelity Mut. L. Ass'n v. Ficklin*. Tesson v. Atlan. Mut. Ins. Co., 40 Mo. 74 Md. 172.

³ *Ib.*

⁴ See *Goring v. Lond. Mut. F. Ins. Co.*, 10 Ont. R. 236; *Butler v. Standard F. Ins. Co.*, 4 Ont. Ap. 391.

⁵ *Duharme v. Mut. Ins. Co.*, 7 L. N. (Can.) 115.

⁶ *Thomson v. Weems*, 9 Ap. Cas. 671; *Duckett v. Williams*, 2 Cr. & Mee. 348; *Mut. Benef. L. Ins. Co. v. Cannon*, 48 Ind. 264; *Miller v. Mut. Benef. L. Ins. Co.*, 31 Iowa, 216; *Dennison v.*

Thomaston Mut. Ins. Co., 20 Me. 125; *Co-op. Ass'n v. Leflore*, 53 Miss. 2;

Tesson v. Atlan. Mut. Ins. Co., 40 Mo. 33; *Merwin v. Star F. Ins. Co.*, 7 Hun.

(N. Y.) 659; *Burritt v. Saratoga Co.*

Mut. F. Ins. Co., 5 Hill (N. Y.), 188;

Foot v. Aetna L. Ins. Co., 4 Daly (N.

Y.), 285; *Ins. Co. v. Pyle*, 44 Oh. St.

19; *Commw. Mut. F. Ins. Co. v. Hunt-*

zinger, 98 Pa. St. 41; *West Rocking-*

ham Mut. F. Ins. Co. v. Sheets, 26

Grat. (Va.) 554; *Watertown v. F. Ins.*

Co. v. Cherry, 84 Va. 72.

⁷ L. R. 9, Q. B. 328.

⁸ 16 Oreg. 283.

to the hazard of the risk" shall forfeit, it was held not to lessen the force of the warranty.

560. But the wording of the contract sometimes clearly indicates that the materiality or knowledge of the misrepresentation shall be the decisive test of the policy's validity, and that the truth only of such facts as are material, or known, is warranted. Thus, in *Franklin F. Ins. Co. v. Martin*,¹ where the policy provided that if the assured should describe the buildings otherwise than as they really are, "so that they be charged at a lower premium than is therein proposed, the policy shall be of no force," it was held that the misrepresentation to avoid must have been an operating cause in effecting the insurance at a lower rate than it otherwise would have been had the truth been stated. A forfeiture because of misstatements is frequently limited to such as are "material to the risk," or to such as are "untrue in any material respect."² In *Pimm v. Lewis*,³ it was agreed that a policy should be void if the insured should "omit to communicate any matter material to be made known to the insurer," and the provision was held to mean not only material but also unknown to the insurer, and did not apply to what the insurer might be presumed to know. Conditions that all representations are true "as far as regards the risk" mean those that concern its exposure to the contingency insured against.⁴ And where, in such a clause, in addition to the word "risk" the word "value" is added, the truth is confined to risk and value.⁵

561. Sometimes the truth is only stipulated for so far as the facts are material and known to the insured. In *Houghton v. Mfrs. Mut. F. Ins. Co.*,⁶ a fire policy provided that "if the representations made in the application of the assured for insurance do not contain a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the premises, so far as the same is known to the applicant and material, the policy shall be avoided," and it was held to stipulate as a condition precedent that the facts were true so far as known and material to

¹ 40 N. J. L. 568.

² *North Western Mut. L. Ins. Co. v. Heimann*, 93 Ind. 24; *Planters' Ins. Co. v. Myers*, 55 Miss. 479.

³ 2 F. & F. 778.

⁴ *Friesmuth v. Agawam Mut. F. Ins.*

Co., 10 Cush. (Mass.) 587; *Chase v.*

Hamilton Mut. Ins. Co., 22 Barb. (N. Y.) 527.

⁵ *Chase v. Hamilton Mut. Ins. Co.*,

supra.

⁶ 8 Met. (Mass.) 114.

the risk. In *Ætna Ins. Co. v. Grube*,¹ it was stated that the statements in the application, containing the description and the survey, were true "so far as the same are known to the applicant and material to the risk." The conditions annexed and referred to the policy, made the survey a part of the policy and a warranty, and it was held the survey was a warranty, but the warranty only extended to so much as was known and material, therefore it gives the application the same effect as a representation. The words of the application that "there are no misrepresentations or suppression of known facts" mean wilfully false.²

562. So the superadded words that the facts are true "to the best of the insured's knowledge" imply a wilful untruth to avoid. Thus, in *Clapp v. Mass. Benef. Ass'n*,³ where a certificate issued on the condition that all the statements in the application were in "all respects true" and at the end of the application the applicant warranted "each of the foregoing statements to be true to the best of his knowledge and belief," and signed a statement that he had not "concealed any material information, agreeing that any untrue or fraudulent statements" made by him should forfeit the insurance, it was held the words "best of his knowledge" qualified the warranty in the other clauses "true" and "untrue and fraudulent statements," and the burden was on the insurer. In *United Breth. Mut. Aid Soc. v. Kinter*,⁴ the insured stated that he was free from certain diseases, and that to the best of his knowledge and belief he was free from all diseases not before specifically mentioned. There was a clause that the above if false should avoid the policy, and it was held that there was no warranty of freedom from any diseases except those specified. Though in all probability even with such

¹ 6 Minn. 82. See *Noone v. Transatlan. F. Ins. Co.*, 58 Cal. 152; *Garcelon v. Hampden F. Ins. Co.*, 50 Me. 580; *Elliott v. Hamilton Mut. Ins. Co.*, 13 Gray (Mass.), 139; *Houghton v. Mfrs. Mut. F. Ins. Co.*, 8 Met. (Mass). 114; *Blackstone v. Standard L. & Acc. Ins. Co.*, 74 Mich. 592; *Redman v. Hart. F. Ins. Co.*, 47 Wis. 89; *Mulville v. Adams*, 19 Fed. R. 887 (N. D. N. Y.); *Whitlaw v. Phoenix Ins. Co.*, 28 U. C. C. P. 53; *Kerr v. Hastings Mut. F. Ins. Co.*, 41 U. C. Q. B. 217; *McGibbon v. Imperial F. Ins. Co.*, 2 R. & G. (N. S.) 6.
² *Ill. Mason's Benev. Soc. v. Winthrop*, 85 Ill. 537.
³ 146 Mass. 519.
⁴ 12 W. N. C. (Pa.) 76. See also *Wilkins v. Germania F. Ins. Co.*, 57 Iowa, 529; *Anders v. Supreme Lodge*, 51 N. J. L. 175; *France v. Ætna Ins. Co.*, 94 U. S. 561; *Ins. Co. v. Gridley*, 100 U. S. 614; *Redman v. Hartford F. Ins. Co.*, 47 Wis. 89; *Confederation L. Ass'n v. Miller*, 14 Duv. (Can.) 330.

words as these last an avoidance would be had where the answers were knowingly false, or where the insured really had no knowledge or belief at all.¹ Conditions of forfeiture for an untruth are also qualified when the insured does not make a positive answer, but adds that his statements were only correct so far as he could remember, in which case the misstatement must be intentional and material to avoid.²

563. Other policies are also met with in which the phraseology has been construed by the Courts to mean that a misstatement does not avoid unless designedly false. Thus, in *Fowkes v. Manchester & Lond. Assur., Etc., Ass'n*,³ a life policy was issued on A.'s life, which was founded on a written declaration which was agreed to be the basis of the contract, and stipulating that "if any statement in the declaration (which declaration should be considered as much a part of that policy as if the same had been actually set forth therein) was untrue; or if the assurance by the policy should have been effected by or through any wilful misrepresentation, concealment, or false averment whatsoever, the policy should be void." The insured "declared that the above written particulars are correct and true throughout, and agreed that this proposal and declaration shall be the basis of the contract" . . . "and if it shall hereafter appear that any fraudulent concealment or designedly untrue statement be contained therein, then all the money which shall have been paid on account of the assurance made in consequence hereof shall be forfeited, and the policy granted in respect of such assurance shall be absolutely null and void." It was held that the policy and declaration must be read together, and thus reading them that the policy was not avoided by any untrue statement in the declaration, unless designedly untrue. In *Wash. L. Ins. Co. v. Schaible*,⁴ the application was the basis of the contract, and its statements declared to be fair and true, "and that any wilfully untrue or fraudulent answers, any suppression of facts," etc., would render the policy void. A policy was issued in consideration

¹ See *Wash. L. Ins. Co. v. Haney*, 10 Kan. 525; *Fisher v. Crescent. Ins. Co.*, 33 Fed. R. 549 (W. D. N. C.); remarks of Wilson, C. J., in *Miller v. Confederation L. Ins. Co.*, 14 Ont. Ap. 218. See s. c. 14 Duv. (Can.) 330.

² *Ætna L. Ins. Co. v. France*, 94 U. S. 561.

³ 3 B. & S. 917.

⁴ 1 W. N. C. (Pa.) 369; 9 Phila. 136. See *Nat. Bk. v. Un. Ins. Co.* 88 Cal. 497; *Russell v. Can. L. Assur. Co.*, 32 U. C. C. P. 256.

of the representations in the applications, and it was held only wilfully untrue statements would avoid.

564. Sometimes a warranty is qualified by the fact that the insured's answers are not untruthful, owing to the fact that he has relied on certain explanations of one of the insurer's officials. For instance, in *Conn. Mut. Ins. Co. v. McMurdy*,¹ a printed application was made part of the policy, and was headed "Questions to be asked by the medical examiner, who will fully explain the questions and witness the answers and signature of the person examined." At the time of the examination the medical examiner made certain verbal explanations of the meaning of the printed questions, and it was held that the applicant might properly infer that he should answer the questions with reference to the construction and explanations given, and if answered in good faith according to the interpretation put upon them at the time by the representative of the company, there could be no objection to proving the facts and submitting them to the jury, notwithstanding the truth of his answers to the questions.

565. It has been said or implied, when the agreement is that the truth of the statements is warranted so far as known and material, or that any fraudulent or material statement will avoid, that it is unimportant whether the words are considered as creating a warranty or a representation.² It is suggested, however, that this language is inartificial, and should be restricted to the facts of the cases in which it has been employed. For when the truth is expressly warranted, so far as known, or material, etc., then the legal result would be that being a warranty a literal compliance is necessary so far as the warranty is intended to extend; but, if a representation, only a substantial compliance is required.

566. A warranty may be intended only to describe the present condition of affairs, or it may be intended to mean that the present state of affairs is to continue during the existence of the policy. In the former case it is usually termed affirmative, and in the latter promissory.³ It has been sometimes said there is a distinction

¹ 89 Pa. St. 363.

v. Adams, 19 Fed. R. 887 (N. D.

² See *Houghton v. Mfrs. Mut. F. Ins. Co.*, 8 Met. (Mass.) 114; *Ætna Ins. Co.* N. Y.).

³ *O'Neill v. Buffalo F. Ins. Co.*, 3 N.

r. Grube, 6 Minn. 82; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; *Mulville* Y. 122. See *ante*, § 533.

between the two.¹ But the difference is rather that of form than of substance. And it is submitted that in legal effect the two are precisely alike. The only real point to be determined is, did the parties intend that the allegation or warranty of a fact should apply to a present state of things, or that the present state should continue? In other words, what did the contract of the parties mean? Where, however, there is any doubt as to whether the warranty is intended to refer only to the date of the policy or to a continuous state of facts, the doubt will be always resolved in favor of the insured.² Promissory warranties must be as strictly performed as affirmative warranties.³ And the burden of proof is on the insured.⁴

567. The same rules of construction apply to a contract of insurance as to any other contract.⁵ That is, that it is to be construed,

¹ See *James v. Lycoming Ins. Co.*, 4 L. Ins. Co. v. Ingram, 34 Miss. 215; Cliff. 272 (D. Mass.).

² See *Hartford F. Ins. Co. v. Smith*, 3 Colo. 422; *Imperial F. Ins. Co. v. Kiernan*, 15 Ins. L. J. 353 (Ky.); *Germania F. Ins. Co. v. Deckard*, 3 Ind. Ap. 361; *Gould v. York Co. Mut. F. Ins. Co.*, 47 Me. 403; *Blood v. Howard F. Ins. Co.*, 13 Cush. (Mass.) 472; *O'Neil v. Buffalo F. Ins. Co.*, 3 N. Y. 122; *Browning v. Home Ins. Co.*, 71 N. Y. 508; *Cumberland Val. Mut. Protec. Co. v. Douglass*, 58 Pa. St. 419; *Gilliat v. Pawtucket Mut. F. Ins. Co.*, 8 R. I. 282

³ See *Stout v. City F. Ins. Co.*, 12 Iowa, 371; *Kimbal v. Aetna Ins. Co.*, 9 Allen (Mass.), p. 542; *Gilliat v. Pawtucket Mut. F. Ins. Co.* 8 R. I., p. 294. Though see the remarks of Clifford, J., in *James v. Lycoming Ins. Co.*, 4 Cliff. 272 (D. Mass.).

⁴ *Richards v. Protec'n Ins. Co.*, 30 Me. 273; *Wilson v. Hampton F. Ins. Co.* 4 R. I. 159.

⁵ *Wells v. Pacific Ins. Co.*, 44 Cal. 397; *State Ins. Co. v. Horner*, 14 Colo. 391; *Amer. Ins. Co. v. Leonard*, 80 Ind. 272; *Wilcutts v. Northwest Mut. L. Ins. Co.*, 81 Ib. 300; *Hoose v. Prescott Ins. Co.*, 84 Mich. 309; *Miss. Mut.*

L. Ins. Co. v. Ingram, 34 Miss. 215; *Renshaw v. Mo. State Mut. F. Ins. Co.*, 103 Mo. 595; *Gerhauser v. North Brit. Etc., Ins. Co.*, 7 Nev. 174; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; *Dwight v. Germania L. Ins. Co.*, 103 N. Y. 341; *Hone v. Mut. Safety Ins. Co.*, 1 Sand. (N. Y.) 137; *West. Farmers' Mut. Ins. Co. v. Miller*, 1 Handy (Oh.), 325; *Holterhoff v. Mut. Benef. L. Ins. Co.*, 3 Am. L. Rec. 272 (Oh.); *Conn. Mut. L. Ins. Co. v. Pyle*, 2 West. R. 377 (Oh.); *Weidert v. State Ins. Co.*, 14 Oreg. 261; *Frisbie v. Fayette Mut. Ins. Co.*, 27 Pa. St. 325; *Grandin v. Rochester German Ins. Co.*, 107 Ib. 26; *Splawn v. Chew*, 60 Tex. 532; *Home Ins. Co. v. Gwathmey*, 82 Va. 923; *U. S. Mut. Acc. Ass'n v. Newman*, 84 Va. 52; *Watertown F. Ins. Co. v. Cherry*, 84 Va. 72; *Universal L. Ins. Co. v. Devore*, 88 Va. 778; *Prieger v. Exchange Mut. Ins. Co.*, 6 Wis. 89; *Sawyer v. Dodge Co. Mut. Ins. Co.*, 37 Wis. 503; *Ins. Co. v. Boon*, 95 U. S. 117; *Carpenter v. Providence Wash. Ins. Co.*, 16 Pet. 495; *Henshaw v. Mut. Safety Ins. Co.*, 2 Blatch. 99 (S. D. N. Y.); *Crane v. City Ins. Co.*, 3 Fed. R. 558 (S. D. Oh.); *Scott v. Quebec F. Assur. Co.*, *Stewart* (L. Can.), 147.

in the first place, according to its true sense and meaning, as collected from the terms used in it; and, secondly, that they are to be understood in their plain, ordinary and popular sense, unless they have, by some known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must be understood in some other special and peculiar sense in the particular instance, in order to effectuate the immediate intention of the parties. The only difference between policies of insurance and other instruments, in this respect, is that the greater part of the printed language of them, being invariable and uniform, has acquired from use a known and definite meaning; and that the written words, inasmuch as they are the immediate language and terms selected by the parties themselves for the expression of their meaning, are entitled, if there be a reasonable doubt upon the sense of the whole, to have a greater effect attributed to them than to the printed words, subject indeed always to be governed, in point of construction, by the language and terms with which they are accompanied,¹ though if possible both should be construed together.² However, as Chalmers, J., observed in *Co-operative L. Ass'n v. Leflore*,³ and as the reader will probably admit, after a perusal of this Treatise, "it is impossible to resist the conclusion, in perusing the cases, that the Courts, in order to avoid supposed hardships in this class of suits, have been disposed to adopt other rules than those applicable to ordinary contracts."

¹ See remarks of Lord Ellenborough in *Coster v. Phoenix Ins. Co.*, 2 Wash. 51, 53 (D. Pa.). See also *Hernandez v. Sun Mut. Ins. Co.*, 6 Blatch. 317 (S. D. N. Y.); *Stout v. Commer. Un. Ins. Co.*, 11 Biss. 309 (D. Ind.); *Meagher v. Home Ins. Co.*, 11 U. C. C. P. 328.
² *Cobb v. Ins. Co. of N. A.*, 17 Kan. 492; *Wallace v. Ins. Co.*, 4 La. 289; *Bargett v. Orient Ins. Co.*, 3 Bos. (N. Y.) 385; *Hayward v. Northwest Ins. Co.*, 19 Abb. (N. Y.) 116; *Grandin v. Rochester Ins. Co.*, 107 Pa. St. 26; *Peoples' Ins. Co. v. Kuhn*, 12 Heisk. (Tenn.) 515; *Ga. Home Ins. Co. v. Jacobs*, 56 Tex. 366. Remarks of Washington, J.,

in *Coster v. Phoenix Ins. Co.*, 2 Wash. 51, 53 (D. Pa.). See also *Hernandez v. Sun Mut. Ins. Co.*, 6 Blatch. 317 (S. D. N. Y.); *Stout v. Commer. Un. Ins. Co.*, 11 Biss. 309 (D. Ind.); *Meagher v. Home Ins. Co.*, 11 U. C. C. P. 328.
³ *Cobb v. Ins. Co. of N. A.*, 17 Kan. 492; *Wallace v. Ins. Co.*, 4 La. 289; *Bargett v. Orient Ins. Co.*, 3 Bos. (N. Y.) 385; *Coster v. Phoenix Ins. Co.*, 2 Wash. 51 (D. Pa.); *Hernandez v. Sun Mut. Ins. Co.*, 6 Blatch. 317 (S. D. N. Y.).

³ 53 Miss. 1, 15.

568. It is often said that a policy of insurance should be liberally construed,¹ though it is not clear what this precisely means. It may mean that it is not to be subjected to the same degree of technical strictness as would be the case in other contracts, so that a liberal construction would be one in which the insured is favored more than the company. If this is the meaning, the phrase is not technical, and is an unhappy one.² However this may be, it is not apparent why the contract should not in all respects be construed like any other—that is, according to the true intention of both parties, and not more strongly against the insurer than against the insured.³ But it is to be observed that as the insurer draws the conditions of the contract, he will probably make use of appropriate language to express his intention and to fully protect his own interests, and therefore, where he employs doubtful language or creates a latent ambiguity, it should be construed against the insurer or writer of the language, as in the case of other contracts.⁴

¹ See *Grant v. Lexington F. L. & M. Mut. Acc. Ass'n*, 133 Ill. 556; *Un. Mut. Ins. Co.*, 5 Ind. 23; *Supreme Lodge K. of P. v. Schmidt*, 98 Ind. 374; *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242; *Palmer v. Warren Ins. Co.*, 1 Story, 360 (D. Mass.); *Amer. Basket Co. v. Farmville Ins. Co.*, 3 Hughes, 251 (E. D. Va.).

² See *Merch. Ins. Co. v. Edmonds*, 17 Grat. (Va.) 138.

³ *Westchester F. Ins. Co. v. Weaver*, 70 Md. 536.

⁴ *Fowkes v. Manchester & Lond. L. Assur., Etc., Ass'n*, 3 B. & S. 917; *Pelly v. Royal Exchange Assur. Co.*, 1 Burr. 3; *Anderson v. Fitzgerald*, 4 H. L. C. p. 507; *Piedmont & Arlington L. Ins. Co. v. Young*, 58 Ala. 476; *Ala. Gold L. Ins. Co. v. Johnston*, 80 Ib. 467; *Wells v. Pacif. Ins. Co.*, 44 Cal. 397; *Rankin v. Amazon Ins. Co.*, 89 Cal. 203; *Atlan. Ins. Co. v. Maun- ing*, 3 Colo. 224; *Boon v. Ætna Ins. Co.*, 40 Conn. 575; *Northw. Mut. L. Ins. Co. v. Ross*, 63 Ga. 199; *McCarty v. Howell*, 24 Ill. 341; *Commer. Ins. Co. v. Robinson*, 64 Ib. 265; *Schroeder v. Trade Ins. Co.*, 109 Ill. 157; *Healey v. Mut. Acc. Ass'n*, 133 Ill. 556; *Un. Mut. Acc. Ass'n v. Frohard*, 134 Ill. 228; *Mut. Mill Ins. Co. v. Gordon*, 121 Ill. 366; *Grant v. Lexington F. L. & M. Ins. Co.*, 5 Ind. 23; *Penn Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92; *Northw. Mut. L. Ins. Co. v. Hazelett*, 105 Ind. 212; *Continen. Ins. Co. v. Vanlue*, 126 Ind. 410; *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285; *Miller v. Mut. Benef. L. Ins. Co.*, 31 Iowa, 216; *N.Y. L. Ins. Co. v. Flack*, 3 Md. 341; *Symonds v. Northwest. Mut. L. Ins. Co.*, 23 Minn. 491; *Loy v. Home Ins. Co.*, 24 Ib. 315; *Cargill v. Millers & Mfrs. Mut. Ins. Co.*, 33 Ib. 90; *Olson v. St. Paul F. & M. Ins. Co.*, 35 Ib. 432; *Brown v. R'way Pass. Assur. Co.*, 45 Mo. 221; *Wash. Mut. F. Ins. Co. v. St. Mary's Sem- inary*, 52 Ib. 480; *Hale v. Springfield F. & M. Ins. Co.*, 46 Mo. Ap. 508; *Carr v. Roger Williams Ins. Co.*, 13 Ins L. J. 443 (N. H.); *Gerhauser v. North Brit., Etc., Ins. Co.*, 7 Nev. 174; *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300; *Anders v. Knights of Honor*, 51 N. J. L. 175; *McLaughlin v. Washington Co. Mut. Ins. Co.*, 23 Wend. (N. Y.) 525; *Hoff-*

In accordance with this rule, in the event of a doubt as to the intention of the parties, the language will be construed rather to favor words of description or representation than an express warranty, for it must always clearly appear that a warranty is intended, and the language will not be extended by construction.¹ Nor is the word "warrant" always conclusive of what was intended,² nor is

- man v. *Ætna F. Ins. Co.*, 32 N. Y. 405; *Walsh v. Wash. M. Ins. Co.*, 32 Ib. 427; *Reynolds v. Commerce F. Ins. Co.*, 47 N. Y. 597; *McMaster v. Ins. Co. of N. A.*, 55 Ib. 222; *Griffey v. N.Y. Cent. Ins. Co.*, 100 Ib. 417; *Kratzenstein v. West. Assur. Co.*, 116 Ib. 54; *Halpin v. Ins. Co. of N. A.*, 120 Ib. 73; *Mowry v. World Mut. L. Ins. Co.*, 7 Daly, 321 (N.Y.); *Hoffman v. Ætna Mut. Benef. L. Ins. Co.*, 3 Am. L. Rec. 272 (Oh.); *Western Ins. Co. v. Cropper*, 32 Pa. St. 351; *Merrick v. Germania F. Ins. Co.*, 54 Ib. 277; *Franklin F. Ins. Co. v. Brock*, 57 Ib. 74; *Metropolitan L. Ins. Co. v. Drach*, 101 Ib. 278; *Burkhard v. Travellers' Ins. Co.*, 102 Ib. 262; *Grandin v. Rochester German Ins. Co.*, 107 Ib. 26; *Humphreys v. Nat. Benef. Ass'n*, 139 Pa. St. 264; *Wilson v. Hampden F. Ins. Co.*, 4 R. I. 159; *Hoffman v. Ins. Co.'s*, 88 Teun. 735; *Goddard v. East. Tex. F. Ins. Co.*, 67 Tex. 69; *N. O. Ins. Co. v. Gordon*, 68 Ib. 141; *Brink v. Merch. & Mechan. Ins. Co.*, 49 Vt. 442; *Merch. Ins. Co. v. Edmonds*, 17 Grat. (Va.) 138; *U. S. Mut. Acc. Ass'n v. Newman*, 84 Va. 52; *Watertown F. Ins. Co. v. Cherry*, 84 Va. 72; *Morse v. Buffalo F. & M. Ins. Co.*, 30 Wis. 534; *Redman v. Hartford F. Ins. Co.*, 47 Wis. 89; *Wakefield v. Orient Ins. Co.*, 50 Wis. 532; *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361; *Nat. Bk. v. Ins. Co.*, 95 U. S. 673; *Moulton v. Amer. L. Ins. Co.*, 111 Ib. 335; *Thomson v. Phoenix Ins. Co.*, 136 Ib. 287; *Wallace v. Ger. Amer. Ins. Co.*, 41 Fed. R. 742 (N. D. Iowa); *Cotten v. Fidelity & Casualty Co.*, 41 Fed. R. 506 (S. D. Miss.); *Scott v. Scot. Acc. Ins. Co.*, 16 C. S. C. (4th ser.) 630; *Palmer v. Warren Ins. Co.*, 1 Story (D. Mass.), 360; *Catlin v. Springfield F. Ins. Co.*, 1 Sum. 434 (D. Mass.); *Sayles v. Northw. Ins. Co.*, 2 Curt. 610 (D. R. I.); *Wallace v. German Amer. Ins. Co.*, 4 McCrary, 123 (D. Iowa); *Sheerer v. Manhattan L. Ins. Co.*, 16 Fed. R. 720 (D. Ky.); *Teutonia Ins. Co. v. Boylston Mut. Ins. Co.*, 20 Fed. R. 148 (E. D. La.); *Hammond v. Cit. Ins. Co.*, 26 N. Bruns. 371.
- ¹ *Anderson v. Fitzgerald*, 4 H. L. C., p. 507; *Noone v. Transatlan. F. Ins. Co.*, 88 Cal. 152; *Nat. Bk. v. Un. Ins. Co.*, 88 Cal. 497; *Mut. Benef. L. Ins. Co. v. Robertson*, 59 Ill. 123; *Continental L. Ins. Co. v. Rogers*, 119 Ill. 474; *Miller v. Mut. Benef. L. Ins. Co.*, 31 Iowa, 216; *Daniels v. Hudson River Ins. Co.*, 12 Cush. (Mass.) 416; *Campbell v. New Eng. Mut. L. Ins. Co.*, 98 Mass. 381; *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; *Vivar v. Knights of Pythias*, 52 N. J. L. 455; *Wilson v. Conway F. Ins. Co.*, 4 R. I. 142; *Schwarzbach v. Oh. Val. Protec. Un.*, 25 W. Va. 622; *Phoenix Ins. Co. v. Raddin*, 120 U. S. 183; *Hammond v. Cit. Ins. Co.*, 26 N. Bruns. 371.
- ² *Wheaton v. N. Brit. & Mercan. Ins. Co.*, 76 Cal. 415; *Rogers v. Phoenix Ins. Co.*, 121 Ind. 570; *Throop v. N. Amer. F. Ins. Co.*, 19 Mich. 423; *Owens v. Holland Purchase Ins. Co.*, 56 N. Y. 565; *Redman v. Hart. F. Ins. Co.*, 47 Wis. 89.

the word "condition."¹ Though the use of the word "warranty" or "representation" is necessarily a factor in determining whether from the whole language a warranty or a representation is implied,² often too great stress is laid on the employment of these words.

569. It is frequently said that "forfeitures are odious to the law," or that "forfeitures are not favored and will not be judicially declared if the rights of the parties can be fully saved and secured without," or that they will be "mitigated or relieved against when it can be done without violence to the contract of the parties."³ But a perusal of the judgments in the great majority, perhaps nearly all of the cases, will show that the rules as to forfeiture simply are that where the contract of forfeiture is lawful, the language of the policy must show clearly that a forfeiture is intended; and the language must be taken, if doubtful, to bear against the insurer, because he wrote it. In other words, forfeitures are strictly construed and against the party writing them into the contract.⁴ In *Douglas v. Knickerbocker L. Ins. Co.*⁵ it was held that the language of the policy need not in so many words expressly provide for a forfeiture in order to make one effectual. Where an endowment life policy provided for a forfeiture should the insured "travel upon the seas," but upon the back of the policy it was stipulated that if after a certain number of premiums had been paid the policy should cease in consequence of the non-payment of premiums, the company would on its surrender issue a new policy for the full value acquired under the old one, and the insured forfeited the policy by travelling upon the seas, it was held that the right to a new policy was also forfeited,

¹ *Campbell v. New Eng. Mut. L. Ins. Co.*, 98 Mass. 381.

² *Ib. Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497; *Amer. Pop. L. Ins. Co. v. Day*, 39 N. J. L. 89; *Cushman v. U. S. L. Ins. Co.*, 4 Hun. (N. Y.) 783; *Aicher v. Metropolitan L. Ins. Co.*, 6 W. N. C. (Pa.) 332; *Wash. L. Ins. Co. v. Schaible*, 1 Ib. 369; 9 Phila. 136; *Moulor v. Amer. L. Ins. Co.*, 111 U. S. 335.

³ See *Ewald v. Northwest Mut. L. Ins. Co.*, 60 Wis. 431, 432-6; *Ala. Gold L. Ins. Co. v. Johnston*, 80 Ala. 467.

⁴ See *Mulville v. Adams*, 19 Fed. R. 887 (N. D. N. Y.); *Young v. Mut. L. Ins. Co.*, 2 Saw. 325 (D. Cal.); *Aurora F. Ins. Co. v. Eddey*, 55 Ill. 213; *North Berwick Co. v. New Eng. F. L. M. Ins. Co.*, 52 Me. 336; *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143; *Lyon v. Travellers' Ins. Co.*, 55 Ib. 141; *Mayor v. Hamilton F. Ins. Co.*, 10 Bos. (N. Y.) 537; *Helme v. Phila. L. Ins. Co.*, 61 Pa. St. 107; *O'Conner v. Towns*, 1 Tex. 107; *Ewald v. N. West. Mut. L. Ins. Co.*, 60 Wis. 431.

⁵ 83 N. Y. 492.

and that the premiums already paid were forfeited, though there was no express stipulation to that effect.

570. Where the contract is contained in several documents, as in a policy and application,¹ or in a policy and premium note,² the various documents should be construed as constituting one instrument.

As a general rule, a special clause of exception will govern a general clause.³ But where a clause in the application stipulated that the statements therein were correct "so far as regards the risk," and another clause in it, to which the policy was expressly made subject, provided that misrepresentation of material facts would destroy any claim for a loss, and the application contained an untrue representation as to incumbrances, it was held that the policy was void, for the express covenant as to "the risk" did not limit the assured's responsibility for other material misrepresentations.⁴ In *Foot v. Aetna L. Ins. Co.*,⁵ the proposals were part of the contract, and it was stipulated in the policy if they should be in any respect false or fraudulent the policy was to be void. To a number of questions as to health the insured answered incorrectly "no," and at the end of the questions the insured declared in writing that the answers were correct and should form the basis of the contract, and also that any untrue or fraudulent answer or suppression of facts as to his health should avoid the policy, and it was held the policy was avoided, and the proviso that if the answers should be found in any respect false, etc, was not a merger or waiver of the previous provisions. In *Continental L. Ins. Co. v. Rogers*,⁶ the statements in the application were in the policy "warranted" "by the insured to be true in all respects, and that if this policy has been obtained by or through any fraud, misrepresentation, or concealment, said policy shall be absolutely null and void;" and it was said the answers in the application must be treated either as repre-

¹ *Fowkes v. Manchester & Lond. L. Assur. Ass'n*, 3 B. & S. 917; *Phoenix Ins. Co. v. Benton*, 87 Ind. 132; *Man-dego v. Centen. Mut. L. Ass'n*, 64 Iowa, 134; *Gahagan v. Un. Mut. Ins. Co.*, 43 N. H. 176; *Finch v. Amer. Popular L. Ins. Co.*, 11 Alb. L. J. 91 (N. Y.); *Chrisman v. State Ins. Co.*, 16 Oreg. 283.

² *Palmer v. Continen. Ins. Co.*, 31 Mo. Ap. 467; *Dircks v. German Ins. Co.*, 34 Ib. 31.

³ *Mitchell Furniture Co. v. Imperial F. Ins. Co.*, 17 Mo. Ap. 627.

⁴ *Friesmuth v. Agwam F. Ins. Co.*, 10 Cush. (Mass.) 587.

⁵ 4 Daly (N. Y.), 285.

⁶ 119 Ill. 474.

sentations or warranties. If as warranties, the latter part of the clause could have no meaning, as the policy would be avoided for an honest misstatement. But if as representations, then the clause would apply and render them void, if wittingly false or material and unwittingly false; but the policy would be valid if not intentionally false and not material. The case, however, turned on the question of burden of proof. In *Elliott v. Hamilton Mut. Ins. Co.*,¹ the proposal was agreed to be "a correct description, so far as regards condition, situation, value, and risk," and that the "misrepresentation, or suppression of material facts shall destroy a claim for damage or loss;" the by-laws to which the policy was subject provided that the application should be a warranty on the part of the insured, and that "unless the applicant should make a correct description and statement of all facts inquired for in the application and of all other material facts in reference to the insurance or to the risk, the policy shall be void," and it was held that this only warranted the truth of material facts described. An obvious mistake on the face of an instrument cannot be corrected, unless from other parts of the instrument there can be no doubt of what the real intention of the parties was. And in giving effect to the intent of the parties, as gathered from the entire instrument, the Court may disregard a mistake apparent on the face of the writing.² In *McQuitty v. Continen. L. Ins. Co.*³ the policy was payable at death or at the end of fifteen years, and the premium was payable in cash and notes. There was a clause of forfeiture for non-payment of the premium and interest in advance on the notes. On the margin of the policy was written "non-forfeitable endowment policy with profits," and it was held that the words in the margin were meaningless and could not be considered, being totally opposed to the body of the policy. It has been stated that an express warranty would exclude any implied one on the same subject.⁴

571. Whether the rule of the common law, that warranties in sales do not apply to visible defects, is applicable to insurance contracts does not seem clear, and the reader is referred to several New York cases to determine the matter.⁵

¹ 13 Gray (Mass.), 139.

⁴ *Scott v. Quebec F. Assur. Co.*, 1

² *Mercan. Ins. Co. v. Jaynes*, 87 Ill. Stew. (L. Can.) 147.

199.

⁵ *Jennings v. Chenango Co. Mut.*

³ 15 R. I. 573.

Ins. Co., 2 Denio (N. Y.), 75; *Ripley*

572. With regard to impossible conditions, the rule laid down in *Paradine v. Jane*¹ was that "Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. As in the case of *Waste*, if a house be destroyed by tempest or by enemies, the lessee is excused. . . . But when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And, therefore, if the lessee covenants to repair a house, though it be burnt by lightning or thrown down by enemies, yet he ought to repair it."² This rule was somewhat more amply stated by Blackburn, J., about two hundred years later in *Taylor v. Caldwell*,³ as follows: "There seems no doubt, where there is a positive agreement to do a thing not unlawful, the contractor must perform it, or pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible."⁴ But this rule is only applicable when the contract is positive and absolute, and not subject to any condition, express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must have known it could not be fulfilled, unless when the time of the fulfilment arrived some particular specified thing continued to exist, so that when entering into the contract they must have such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach of performance, it becomes impossible. Thus where A. agreed to give B. the use of a music hall on certain days

v. Ætna Ins. Co., 30 N. Y. 136; *Kennedy v. St. Lawrence Co. Mut. Ins. Co.*, 1637; *Shubrick v. Salmud*, 3 Burr. 1637; *Worsley v. Woods*, 6 D. & E., 10 Barb. (N. Y.) 285; *Cushman v. U. S. L. Ins. Co.*, 4 Hun. (N. Y.) 783. See *Merch. & Mfrs. Mut. Ins. Co. v. Wash. Mut. Ins. Co.*, 1 Handy (Oh.), 408.

¹ *Alleyn*, p. 27.

² See also *Hadley v. Clark*, 8 T. R.

259; *3 B. & S.*, p. 833.

³ See 1 Roll. Abr. 450, Condition (G.); note to *Walton v. Waterhouse*, 2 Saund. 421 a, n 2; *Hall v. Wright*, E. B. & E. 746.

for concerts, with no express stipulation as to fire, in the event of destruction by fire both parties will be excused from performance.¹

573. Frequently policies contain insurances on separate items of property separately enumerated and separately valued, and the question arises whether the whole policy is forfeited if the insurance as to one item is void. In considering this we shall omit cases turning on fraud and illegality, which are discussed elsewhere under those heads. In most of the States, and in Ontario, the rule is that where the premium is single and the subject is substantially one risk, though the policy embraces several items separately enumerated, the contract is entire, and a forfeiture as to one item will forfeit the entire contract.² And this is true whether the separate items are chattels,³ or realty and personalty,⁴ or separate pieces of realty.⁵ In

¹ Taylor v. Caldwell, 3 B. & S. 826. See O'Neill v. Ottawa Agricult. Ins. Co., 15 Can. L. J. 207.

² West. Assur. Co. v. Stoddard, 88 Ala. 606; Wolff v. Liv. & Lond. & Globe Ins. Co., 50 N. J. L. 453; Mackay v. Glasgow & Lond. Ins. Co., 4 L. R. Sup. Ct. (Mont.) 124; Essex Sav. Bank v. Meriden Ins. Co., 57 Conn. 335. The cases of Clarke v. New Eng. Mut. Ins. Co., 6 Cush. (Mass.) 342; Date v. Gore Dist. Mut. F. Ins. Co., 14 U. C. C. P. 548, and Goring v. Lond. Mut. Ins. Co., 10 Ont. R. 236, though not *eo nomine* overruled, cannot, in view of the later authorities cited in the following notes, be regarded now as correct law. In the District of Iowa in the Federal Court the Court expressed a *quere* on the point. See Allison v. Phoenix Ins. Co., 3 Dill. 480 (D. Iowa.).

³ Havens v. Home Ins. Co., 111 Ind. 90; Garver v. Hawkeye Ins. Co., 69 Iowa, 202; Phoenix Ins. Co. v. Lawrence, 4 Met. (Ky.) 9; Allen v. Merch. Mut. Ins. Co., 30 La. An. 1386; Lovejoy v. Augusta Mut. F. Ins. Co., 45 Me. 472; Gould v. York Co. Mut. F. Ins. Co., 47 Me. 403; Day v. Charter Oak F. & M. Ins. Co., 51 Me. 91; Associated Firemen's Ins. Co. v. Assum, 5 Md. 165; Bowman v. Franklin F. Ins. Co., 40 Ib.

620; Friesmith v. Agawam Mut. F. Ins. Co., 10 Cush. (Mass.) 587; Brown v. Peoples' Mut. Ins. Co., 11 Ib. 280; Lee v. Howard F. Ins. Co., 3 Gray (Mass.), 583; Kimball v. Howard F. Ins. Co., 6 Ib. 33; Ætna Ins. Co. v. Resh, 44 Mich. 55; Plath v. Minn. Farmers' Mut. F. Ins. Co., 23 Minn. 479; Cuthbertson v. N. C. Home Ins. Co., 96 N. C. 480; Harris v. Oh. Ins. Co., 5 Oh. 466; F. Ass'n v. Williamson, 26 Pa. St. 196; Gottsman v. Pa. Ins. Co., 56 Ib. 210; Franklin F. Ins. Co. v. Brock, 57 Ib. 74; Kelly v. Humboldt Ins. Co., 5 Cent. R. 484 (Pa.); McGowan v. Peoples' Mut. F. Ins. Co., 54 Vt. 211; Hinman v. Hartford F. Ins. Co., 36 Wis. 159; Schumitsch v. Amer. Ins. Co., 48 Ib. 26; Ramsay Woollen Cloth Mfg. Co. v. Mut. F. Ins. Co., 11 U. C. Q. B. 516; Russ v. Mut. F. Ins. Co., 29 Ib. 73; Billington v. Can. Mut. F. Ins. Co., 39 Ib. 433; Bleakley v. Niag. Dist. Mut. Ins. Co., 16 Grant (Can.), 198; Gore Dist. Mut. F. Ins. Co. v. Samo, 2 Duv. (Can.) 411, reversing s. c. in 1 Ont. Ap. 545, and affirming s. c. in 26 U. C. C. P. 405.

⁴ Associated Firemen's Ins. Co. v. Assum, 5 Md. 165.

⁵ Havens v. Home Ins. Co., 111 Ind. 90; Garver v. Hawkeye Ins. Co., 69

Schumitsch v. Amer. Ins. Co.,¹ where there was a clause against change of title in a policy on personalty, and a chattel mortgage was subsequently created, the rule was thus stated: "Where a policy is issued which covers personal property, such as hay, grain, live stock, farming utensils, etc., in a building, and any property of that description is subsequently mortgaged and placed in the building where the risk will attach under the general language, and the insured claims payment for the loss of such mortgaged property as being covered by the policy; there the subsequent chattel mortgage should be deemed a breach of the condition of the policy. If the insured should place subsequently mortgaged property in a building, not claiming that it was covered by the policy, and other personal property in the building should be destroyed which was covered by the policy, the insurance upon the unincumbered property might not be affected by the fact that mortgaged property was in the building at the same time and destroyed with it; but the rule would be otherwise if the insured claimed that the mortgaged property was covered by the policy."

It may, however, be that the policy is so drawn that the intention is to make the contract divisible. In Ireland, in *Daniel v. Robinson*,² a clause in a policy on several properties provided that "if any shall contain a stove," etc., the policy shall be void as to such building, and it was held that a plea which professed to answer the

Iowa, 202; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9; *Allen v. Merch. Mut. Ins. Co.*, 30 La. An. 1386; *Gould v. York. Co. Mut. F. Ins. Co.*, 47 Me. 403; *Lovejoy v. Augusta Mut. F. Ins. Co.*, 45 Me. 472; *Bowman v. Franklin F. Ins. Co.*, 40 Md. 620; *Friesmith v. Agawam Mut. F. Ins. Co.*, 10 Cush. (Mass.) 587; *Brown v. Peoples' Mut. Ins. Co.*, 11 Ib. 280; *Kimball v. Howard F. Ins. Co.*, 8 Gray (Mass.), 33; *Ætna Ins. Co. v. Resh*, 44 Mich. 55; *Plath v. Minn. Farmers' Mut. F. Ins. Co.*, 23 Minn. 479; *Cuthbertson v. N. C. Home Ins. Co.*, 96 N. C. 480; *Harris v. Oh. Ins. Co.*, 5 Oh. 466; *Gottzman v. Pa. Ins. Co.*, 56 Pa. St. 210; *McGowan v. People's Mut. F. Ins. Co.*, 54 Vt. 211; *Hinman v. Hartford F. Ins. Co.*, 36 Wis. 159; *Schumitsch v. Amer. Ins. Co.*, 48 Ib. 26; *Ramsey Woolen Cloth Mfg. Co. v. Mut. F. Ins. Co.*, 11 U. C. Q. B. 516; *Russ v. Mut. F. Ins.*, 29 Ib. 73; *Billington v. Can. Mut. F. Ins. Co.*, 39 Ib. 433; *Gore Dist. Mut. F. Ins. Co. v. Samo*, 2 Duv. (Can.) 411; reversing s. c. in 1 Ont. Ap. 545, and affirming s. c. in 26 U. C. C. P. 405.

¹ *Day v. Charter Oak F. & M. Ins. Co.*, 51 Me. 91; *Lee v. Howard F. Ins. Co.*, 3 Gray (Mass.), 583; *F. Ass'n v. Williamson*, 26 Pa. St. 196; *Franklin F. Ins. Co. v. Brock*, 57 Ib. 74; *Kelly v. Humboldt Ins. Co.*, 5 Cent. R. 484 (Pa.); *Bleakley v. Niag. Dist. Mut. Ins. Co.*, 16 Grant (Can.), 198.

² *Batty (Ir.)* 650.

whole declaration, and only set up the presence of stoves in certain buildings, was bad.¹ In Maine, the Statute of 1861, c. 34, sec. 3, provides that an innocent misrepresentation as to title should not avoid, and of course where there is a misrepresentation as to the title on one item of property this point could not be vital.²

Other Courts, however, apparently hold that such a contract is divisible, and that a breach as to one item would not forfeit the whole insurance.³ But such a clause as that: "If the property, either real or personal or any part thereof, shall be incumbered, . . . it must be represented . . . otherwise this entire policy and every part thereof shall be void," was held to be indivisible and that a breach as to one item will avoid the whole policy.⁴ Where, however, there are two policies taken together, one on merchandise in a storehouse, and another on a factory, and the former contained a clause against increase of risk and the latter a clause as to time of running, it was held that a permit increasing the time of running would not be an increase of risk so to affect the first policy.⁵

574. In the actual construction of the contract the rule is that a written contract should be construed by the Court, unless there may be some peculiar or unintelligible meaning attached to the words by reason of a custom of trade.⁶ Where the evidence is clear enough as to breach of warranty for the Court to infer as matter of

¹ See also *Rogers v. Phoenix Ins. Co.*, 121 Ind. 570. *Ib.* 522; *Dacey v. Agricult. Ins. Co.*, 21 Ib. 83; *Woodward v. Republic Ins. Co.*, 32 Ib. 365. Though see *Smith v. Empire Ins. Co.*, 25 Barb. (N. Y.) 497; *Quarner v. Peabody Ins. Co.*, 10 W. Va. 507; *Richmond, Etc., F. Ins. Co. v. Fee*, 14 Q. L. R. 293.

² *Fox v. Phoenix Ins. Co.*, 52 Me. 333.

³ *Commer. Ins. Co. v. Spaukneble*, 52 Ill. 53; *Ill. Mut. F. Ins. Co. v. Fix*, 53 Ib. 151; *Hartford F. Ins. Co. v. Walsh*, 54 Ib. 164; *Ben Franklin Ins. Co. v. Weary*, 4 Brad. (Ill.) 74; *Lohner v. Home Mut. Ins. Co.*, 17 Mo. 247; *Koontz v. Hannibal Sav. & Ins. Co.*, 42 Ib. 126; *Crooks v. Phoenix Ins. Co.*, 38 Mo. Ap. 582; *Burrill v. Chenaugo Mut. Ins. Co.*, 1 Ed. Select Cas. 233; *Merrill v. Agricult. Ins. Co.*, 73 N. Y. 452; *Schuster v. Dutcher's Co. Ins. Co.*, 102 N. Y. 260; *Heacock v. Saratoga Co. Mut. Ins. Co.*, 10 Hun. (N. Y.) 430; *Holmes v. Drew*, 16 Ib. 491; *Sunderlin v. Aetna Ins. Co.*, 18

⁴ *Smith v. Agricult. Ins. Co.*, 118 N. Y. 518.

⁵ *N. Berwick Co. v. New Eng. F. & M. Ins. Co.*, 52 Me. 336.

⁶ *Bowes v. Shand*, 2 Ap. Cas. 455; *Bennett v. Agricult. Ins. Co.*, 51 Conn. 504; *Germania F. Ins. Co. v. Curran*, 8 Kan. 9; *Ala. Gold L. Ins. Co. v. Heron*, 56 Miss. 643; *Brooks v. Standard F. Ins. Co.*, 11 Mo. Ap. 349; *Billington v. Can. Mut. F. Ins. Co.*, 39 U. C. Q. B. 433.

law from the uncontradicted facts as a result, it is for the Court.¹ So the rules and regulations of a society are for the Court to interpret like any other writing, and the society's interpretation does not govern.² In civil cases the breach of warranty need not be proved beyond a reasonable doubt; and the use of the words "decidedly preponderate," in the charge of a Trial Judge, in connection with a direction that the jury need not be satisfied beyond a reasonable doubt, was not ground for reversal.³ And so a direction by the Trial Judge that the insurer must establish a defence of suicide by evidence "outweighing" the plaintiff's was not looked upon as error.⁴

575. The general rule of law is well settled that the law of the place where the contract is made, and not where the action is brought, will govern in enforcing and expounding the contract; unless the parties have in view its execution elsewhere; in which case its legal effect is to be governed according to the law of the place where it is to be executed.⁵ It is submitted, as a general rule, that a contract may be said to be made when the acceptor unconditionally accepts all of its terms; or if both parties agree it shall only exist upon the performance of a designated condition, when that condition is fulfilled.⁶ When the policy stipulates it shall not take effect till countersigned, &c., by the insurer's agent, it has been held such act of the agent is precedent to its vitality, and the place of the countersigning, &c., is the place of formation.⁷ Other Courts have, however, held such countersigning, when the agent could not decline to agree, as simply ministerial, not precedent, and therefore that the place of countersigning was not the place of the contract.⁸ And it has also been held that the residence of the home office was

¹ *Dwight v. Germania Ins. Co.*, 103 N. Y. 341; *Northw. Ins. Co. v. Muskegon Bk.*, 122 U. S. 501.

² *Wiggin v. Knights of Pythias*, 31 Fed. R. 122 (W. D. Tenn.).

³ *Ætna L. Ins. Co. v. Ward*, 140 U. S. 76.

⁴ *Home Benef. Ass'n v. Sargent*, 142 U. S. 691.

⁵ *Cox v. U. S.*, 6 Pet. 172.

⁶ See *Bailey v. Hope Ins. Co.*, 56 Me. 474; *Eureka Ins. Co. v. Parks*, 1 Cin. S. C. R. (Oh.) 574; *Equit. L. Assur.*

Soc. v. Clements, 140 U. S. 226; *Knights' Templars, Etc., Co. v. Berry*, 50 Fed. R. 511 (8th Cir. Ap.).

⁷ See *Continen. L. Ins. Co. v. Webb*, 54 Ala. 688; *Pomeroy v. Manhat. L. Ins. Co.*, 40 Ill. 398; *Heebner v. Eagle Ins. Co.*, 10 Gray (Mass.), 131; *Thwing v. Great West. Ins. Co.*, 111 Mass. 93; *Knapps v. Homœopathic Ins. Co.*, 117 U. S. 411. See also *Pace v. Pace*, 19 Fla. 438.

⁸ *Whitcomb v. Phoenix Mut. L. Ins. Co.*, 8 Ins. L. J. 624 (Mass.).

the place of contract when the company sent policies in blank, duly signed and sealed, to a local agent in another State, to be filled up in accordance with its terms.¹ It has been held in Canada, that a policy may be within the Dominion Act of 40 Vict., c. 42, a Canadian policy, and still be a New York contract.² It may, however, happen that the statutes of the locality where the insured resides will govern the rights of the parties irrespective of the place of formation.³ And it is not material, in any event, where the subject-matter of the insurance may be situate.⁴ It has been held that a Court will adopt the law of the place where a suit is brought, in the absence of evidence to show what the *lex loci contractus* may be.⁵ Though it has been decided there is no presumption that the Acts of a foreign State are similar to the domestic Statutes. For example, the fact that under the Statute of Massachusetts, the designation of a particular beneficiary is illegal, does not raise the presumption that the designation was also invalid under the Statutes of New York, where the insurer issued the policy.⁶

576. When a foreign insurer pays money in dispute into the Court of the domicile of all the claimants, the question of the *lex fori* or *lex loci contractus* is not material, as the contract is construed as in a contest between citizens of the State where the remedy is sought.⁷ In *Keller v. New Eng. Mut. L. Ins. Co.*,⁸ the policy was for the benefit of the wife in case of the prior decease of the insured, who assigned it for the benefit of creditors, and died before the policy matured. The policy provided it should be governed by the laws of Massachusetts, and it was held that the various rights of the different claimants must be decided by the laws of New York, as the fund was in the custody of the New York Court. In Prince Edward's Island, in *Gilchrist v. McPhee*,⁹ a resident of the Province of New Brunswick took out a policy, payable in New York, for the benefit of his wife if living, and both the insured and beneficiary died later in Colorado. The Probate

¹ *Clarke v. Un. F. Ins. Co.*, 6 Ont. R. 223.

² *Equit. Assur. Co. v. Perrault*, 26 L. Can. J. 382.

³ See *Wall v. Equit. L. Assur. Soc.*, 32 Fed. R. 273 (W. D. Mo.).

⁴ *Merch. & Mfrs. Co. v. Linchey*, 3 Mo. Ap. 588.

⁵ *Collins v. Dawley*, 4 Colo. 138; *Kline v. Baker*, 99 Mass. 253.

⁶ *Daniels v. Pratt*, 143 Mass. 216.

⁷ *Brown's Ap.*, 125 Pa. St. 303.

⁸ 14 Ins. L. J. 310 (N. Y.).

⁹ 2 Prince Edward's Island, 356.

Court of Prince Edward's Island, granted letters of administration to the administrators of the two estates, and the company paid the money into a bank to await the decision of the Court as to which administrator should take; held, the law of Prince Edward's Island governed. In *Wuesterhoff v. Germania L. Ins. Co.*,¹ a resident of New Jersey, procured a policy in a New York company, payable to his wife if she survived, but if not to her children or their guardian. After the wife's death he again married, and appointed in his will his second wife guardian of his children; held, that until the guardian had complied with the statute of New Jersey, she could exercise no authority as guardian.

Having thus described in general the nature of conditions, warranties, and representations, we shall proceed to examine in detail the specific application of the above principles to the various subject-matters of insurance.

¹ 107 N. Y. 580.

CHAPTER II.

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577. To enable any one to recover upon a contract of insurance, the claimant of the insurance money must show that the insurer has agreed to pay him upon the happening of the particular event in consequence of which he makes his claim. Thus, a policy against fire and storm does not cover an injury from a freshet caused by melting snow and accompanied at the time by southerly winds and rain.¹ And on a storm, lightning, and tornado policy the evidence must clearly show direct damage either by the wind or lightning.²

578. It must also be shown for whose benefit an insurance is taken. In policies in respect of property it has been held, where the policy does not clearly show the person intended to be insured, that parol evidence is admissible to show the extent or identity of the interest intended.³ For example, on a policy to A. "and others" parol is admissible to show who the "others" were who were intended.⁴ The identity of one who, it is claimed, is the deceased under a life policy, but denied by the alleged widow, is for the jury.⁵ A joint policy may be issued on an application in the singular number, signed by husband and wife.⁶ Nor is the use of the pronoun "his" in a policy to A. material when it appears the applicant was a female.⁷ But where the husband, Conrad B., signed the application "by agent C. B., applicant," and procured the issue of a policy to C. B., Esq., which he stated to belong to the applicant, but which in fact belonged to his wife, Caroline B., and all the pronouns in the policy were of the masculine gender, it was held the

¹ *Stover v. Ins. Co.*, 3 Phila. 38.

² *Wilson v. Hawkeye Ins. Co.*, 70 Iowa, 91; *German F. Ins. Co. v. Thompson*, 43 Kan. 567. See *ante*, § 10.

³ *Clinton v. Hope Ins. Co.*, 1 Ins. L. J. 436 (N. Y.); *Roots v. Cincin. Ins. Co.*, 1 Dis. (Oh.) 138.

⁴ *Sanders v. Hillsborough Ins. Co.*, 44 N. H. 238.

⁵ *Wackerle v. Mut. L. Ins. Co.*, 4 McCrary (E. D. Mo.), 508.

⁶ *Trefz v. Knickerbocker L. Ins. Co.*, 6 Ins. L. J. 850 (N. J.).

⁷ *Simon v. Home Ins. Co.*, 25 N. W. R. 190 (Mich.).

wife could not recover on the policy, as the insurer had made no contract with her.¹ In *Foley v. McMahon*,² an uncle, who was the proprietor of a shop, insured a friend's life on a policy payable to his nephew, to whom he gave no wages, and on the death of the friend the nephew was given the policy and paid the insurance, which he handed to the uncle for safe-keeping. The uncle had also taken out, at the same time, a similar policy on his own life, and it was held *prima facie* a provision for the nephew.

The use of the words "insured" or "assured" in the same policy does not necessarily refer to different parties unless the context shows it was so intended. Thus, in *Conn. Mut. L. Ins. Co. v. Luchs*,³ A., a partner of B., failing to furnish his portion of the capital, to adjust the matter agreed to insure his life for B.'s benefit, and took out a policy which he retained until the dissolution of the partnership. He then handed it to B., "to show that he intended to do what was right," and A. paid the first two premiums and B. the rest. The application was signed by A. & B., and the policy, in consideration of a sum paid by B., assured the life of A. and promised to pay the "said assured," etc., and was declared to be "accepted by the assured" upon condition that the person whose life is "hereby insured," etc.; and it was held that the context showed that the term "assured" referred to the party for whose benefit the policy was procured. Where a husband, with his wife's authority, insured in his own name the real and personal property of his wife where both resided, by a policy whose terms evinced an intention to insure the entire ownership, it was held that he was entitled to recover for the whole loss up to the amount insured.⁴ On a policy to "A. & Co.," it was held that a recovery could not be had by A. & B., tenants in common of the insured property, though B. was heir-at-law of the other partner in the firm of A. & Co., who had died before the issue of the policy; for only A.'s interest could have been intended, as the firm had ceased to exist when the policy was issued; nor was there a presumption it was firm property, or in any event more than an undivided interest of it.⁵ Where

¹ *Zimmerman v. Farmers' Ins. Co.*, 76 Iowa, 352.

² 73 Ill. 66.

³ 108 U. S. 498. See *ante*, § 1, note 1.

⁴ *Barraciff v. Trade Ins. Co.*, 13 Ins. L. J. 190 (N. J.).

⁵ *Work v. Merch., Etc., F. Ins. Co.*,

a policy issued to the mortgagor, loss payable to the mortgagee, after the mortgagee's title had become absolute, it was held, on a claim by the mortgagor as owner, that the mortgagor's declarations made after the issue of the policy were inadmissible.¹ Where the holder of a mortgage under seal had insured, it was held that he could recover only upon it, but could not tack on a subsequent parol mortgage.²

579. The beneficiary of the insurance is often not designated by name, but as one or more of a class, or as holding a certain relation to the insured. And as the designation is not unusually couched in artificial language the person who is meant to take is not always clearly pointed out. The designation of "the estate of A." in a policy on realty and personalty was held to cover the interest of the heirs and administrator.³ A policy to a mortgagee for the "estate," payable to the mortgagee as interest may appear, may include realty conveyed in trust for creditors, with a reversion, and parol evidence is admissible to show that all interests were intended to be covered.⁴ Where a life policy was issued for the "benefit of estate of insured" parol evidence was admitted to show the interest of a minor child was intended.⁵ Though in Massachusetts, the designation of "the estate of the insured" was held too universal in a beneficial society formed under the Act of 1874, c. 375.⁶

580. As a general rule, the proceeds of a life policy for the benefit of the insured become assets of his estate in the hands of his personal representatives.⁷ An endowment policy payable to the insured or his order was held to go to the insured's estate on his death within the endowment term.⁸ A fire policy to "A. and his legal representatives" was considered to mean his representatives, not his "heirs at law."⁹ In *Griswold v. Sawyer*,¹⁰ the only evidence

¹ *Smith v. Exchange F. Ins. Co.*, 8 J. & S. (N. Y.) 492.

⁷ *Un. Mut. L. Ins. Co. v. Stevens*, 19 Fed. R. 671 (N. D. Ill.). See *ante*.

² *Ogden v. Montreal Ins. Co.*, 3 U. C. C. P. 497.

§ 287.

³ *White v. Smith*, 2 Wil. (Tex.)

⁴ *Clinton v. Hope Ins. Co.*, 1 Ins. L. J. 436 (N. Y.).

§ 401.

⁵ *Ga. Home Ins. Co. v. Kinnier*, 28 Grat. (Va.) 88.

⁶ *Weed v. Hamburg-Bremen L. Ins. Co.*, 133 N. Y. 394.

¹⁰ *Griswold v. Sawyer*, 125 N. Y. 411; 56 Hun. (N. Y.) 12.

⁸ *Pace v. Ib*, 19 Fla. 438.

⁹ *Carrigan v. Mass. Beuef. Ass'n*, 26 Fed. R. 230 (E. D. Pa.). See *ante*, § 471.

was that a paid-up policy payable to the "legal representatives," was issued in exchange for an ordinary life policy on a man's life; and it was held that such phraseology imported that the new policy was for the next of kin or family of the insured; and that as the creditors did not seek to get the former policy the inference was that it also had been taken for the family of the insured. In *Oh. Farmers' Ins. Co. v. Britton*,¹ insurance on a dwelling-house was issued to "B.'s heirs," who were owners, subject to an unassigned dower, the application having been made by the widow. The property was unincumbered and it was held, whether dower was an incumbrance or not, her interest must have been intended to be included under "B.'s heirs." In Texas, a life policy to the insured and his heirs does not form part of the insured's estate, but belongs to the heirs.² It has been held in Arkansas, under a benefit certificate payable to the "heirs" of the intestate, who died leaving a widow, but no children, that the widow would not take unless there were no paternal or maternal kindred who could take.³ A life policy payable to "devisees or heirs-at-law" in the absence of a will was held in Illinois, to go to the widow, to the exclusion of the next of kin, father and brothers.⁴ The designation of "heirs and lawful heirs" in a life policy in a beneficial society has been held to be a loose way of indicating the widow and children.⁵ A life policy in Texas, payable to "legal heirs," does not go to the insured's estate.⁶ In Tennessee, in a life policy "legal heirs" means next of kin.⁷ The words "legal heirs or assigns" have been held in Illinois, where there were children, to exclude the widow.⁸ But in Ohio, where the insured left brothers and sisters, but no children, a widow took under the term "heir."⁹ In Indiana, it being admitted by counsel that the widow came within the term "legal heirs," the fund was ordered to be distributed between the widow, who had been a third wife, and the children of the other two wives in equal parts, as the Court was of

¹ 31 Oh. St. 488.⁶ *Mullins v. Thompson*, 51 Tex. 7.² *White v. Smith*, 2 Wil. (Tex.) § 400.⁷ *Gosling v. Caldwell*, 1 Lea (Tenn.), 454.³ *Johnson v. Knights of Honor*, 53 Ark. 255.⁸ *Gauch v. St. Louis Mut. L. Ins. Co.*, 88 Ill. 251.⁴ *Alex. v. Northw. Masonic Aid Ass'n*, 126 Ill. 558.⁹ *Jamieson v. Knights Templars*, 14 Ins. L. J. 719 (Oh.).⁵ *Hannigan v. Ingraham*, 55 Hun. 257.

the opinion that the distribution must be governed by the terms of the contract, and that the intestate law was inapplicable.¹ It has been held, where the circumstances show it to have been the desire of the testator to provide for them, that the words "heirs and representatives" would include next of kin.² And where the ultimate designation in the by-laws is "heir and legal representatives," and there had been no designation by the insured, the next of kin was held to be intended.³ The words "heirs and representatives of A." in a policy on property were held to cover the interest of A., who was executor and testamentary trustee.⁴ In a society organized under the Statute of 1867, c. 204, of Massachusetts, where a by-law provided it should go to dependent heirs, if no designation by the insured, a mother, who was the sole heir-at-law and dependent, will take.⁵ And in New Jersey, a certificate in a society organized to provide for the insured's family or persons dependent, which was payable to "legal heirs dependent," was held to mean those who shall take where there is no special designation, and would include next of kin who were dependent.⁶ Where it was conditioned that if the beneficiary should die before the insured the heirs should take, and the beneficiary and insured died instantaneously, the heirs were held to take.⁷

581. Where the husband took a policy on his wife's life, payable to his children if he predeceased her, and he died without children, bequeathing his residuary estate to his wife, it was held that she took the policy, but liable to be divested in the event of posthumous children.⁸ Where the policy was on the wife's life, payable to her children, and she died *sine prole*, it was held that her executor could not recover.⁹ In Scotland, it was held that policies on the wife's life in favor of the husband who predeceased her formed a part of his movable estate at his death, and in calculating the legitim of the children were to be valued at their real value in the market.¹⁰ And

¹ Wilburn v. Ib., 83 Ind. 55.

⁶ Britton v. Supreme Council, 46 N.

² Loos v. John Hancock Mut. L. Ins. Co., 41 Mo. 538.

J. Eq. 102.

³ Hodge's Ap., 9 Ins. L. J. 709 (Pa.).

⁷ Padden v. Briscoe, 81 Tex. 563.

⁴ Savage v. Long Island Ins. Co., 43 How. Pr. (N. Y.) 462; Savage v. Howard Ins. Co., 52 N. Y. 502.

⁸ Keller v. Gaylor, 40 Conn. 343.

⁹ McElwee v. N. Y. L. Ins. Co., 47 Fed. R. 798 (E. D. Mo.).

⁵ Supreme Council v. Perry, 5 N. C. S. C. (3d Ser.) 621. East. R. 634 (Mass.).

¹⁰ Pringle's Trustees v. Hamilton, 10

where the husband had insured his wife's life by a policy payable six months after her death to him, it was held, she having died, that the money did not fall into the community of goods, and was not subject to division between the husband and wife's executors.¹ A policy by the husband on his wife's life, payable three months after her death to her executors, etc., is not held in Scotland, on her predecease, to be within the *communio bonorum*, but to belong in *mobilibus* to the heirs of the wife.²

Usually in America, a life policy payable to the wife vests in her as part of her separate estate.³ In Prince Edward's Island, a policy by the husband, payable sixty days after his death to his wife if living, and if not living to his estate, was held on her death a week after her husband and both intestate, to be a chose in action not reduced into possession by the husband, and therefore that her administratrix took.⁴ In America, a policy by the husband on his life payable to the wife, her heirs, etc., on his death subsequent to hers goes, as a rule, to her representatives as part of her separate estate.⁵ If she dies intestate, it is distributed under the intestate laws.⁶ In New York, it has been held that a wife's policy, under the Act of 1840, on her predecease would go in trust for the children to the exclusion of the husband.⁷ An insurance by the husband on his life payable to the wife or her "legal representatives," was held in the District of Columbia, to be a trust intended only for the wife, which on her prior death resulted to the husband, and the words "legal representatives" only mean such persons as by will or by the law, are to administer on the estate of the deceased. But in this case the husband by the laws of the insurance association was entitled to revoke the benefit to his wife at any time.⁸ The policy money in a Massachusetts contract of insurance on the hus-

¹ *Wight v. Brown*, 11 C. S. C. (2d (Colo.); *Hutson v. Merrifield*, 51 Ind. Ser.) 459. 24; *Degither's Ap.*, 83 Pa. St. 537;

² *Smith v. Kerr*, 7 C. S. C. (3d Ser.) Unit. Breth. Mut. Aid. Soc. v. Miller, 863. See *Thomson v. Ib.*, 6 C. S. C. 107 Pa. St. 162. (4th Ser.) 1227.

³ *McNeil v. Unit. Order of Golden Cross*, 131 Pa. St. 339; *Evans v. Opperman*, 76 Tex. 293. ⁶ *De Ginther's Ap.*, *supra*; *Henderson's Ap.*, *supra*; *United Breth. Mut. Aid Soc. v. Miller*, *supra*.

⁴ *Gilchrist v. McPhee*, 2 Pr. Ed. Is. Ins. § 340. ⁷ *Secor v. Dalton*, cited in *Bliss on*

356. ⁸ *Wash. Benef. Endowment Ass'n v. Wood*, 4 Mack. (D. C.) 19.

⁵ *Goodrich v. Treat*, 7 Ins. L. J. 269

band's life for the wife, on his death after her predecease without children intestate, was held to go to the husband under the intestate law.¹ A policy for the wife, and in case of her predecease to the children, vests in Colorado, on the insured's death in the widow.² A policy was made payable to the insured if he reached the age of fifty-five, but if not to the executor, etc., of A.; and also the phrase occurred, in case of his death before fifty-five to B., wife of A., and it was held only to go to the widow's estate in case she survived the insured.³ In New York, a policy for the wife, if living, as by the statute, but if not living to the children of the insured, and if no children surviving to the insured's executor, was held on the wife's predecease to go to the surviving children as a class.⁴ In *Walsh v. Mut. L. Ins. Co.*⁵ the policy was for the wife if living, but if not living to her children. A., a child, died, leaving a husband and children; then the wife died; then a son of the insured died, and then the insured died, leaving a daughter B.; and it was held that A.'s right was contingent on the survival of her mother, and that B. took. A policy by the husband to his wife, or "the legal representatives" of the insured, was held in Illinois, to go to his representatives if she predeceased him.⁶ In certain beneficial societies by the terms of the contract the wife's prior death revokes her interest.⁷

582. When the wife, in a beneficial society is named as beneficiary, it has been held that the legal wife is intended.⁸ For instance, the second wife of a bigamist cannot take, though ignorant of the first marriage.⁹ Nor can one who is recognized as the insured's wife take when a former undivorced deserted wife still lives.¹⁰ But under a policy payable to A, "his wife" or such persons as he might indicate, it was held that she would take, though not his legal wife.¹¹ And where A. cohabited with a woman named B. who lived with him as

¹ *Cole v. Knickerbocker L. Ins. Co.*, 63 How. Pr. (N. Y.) 442.

² *Chartrand v. Brace*, 16 Colo. 19.

³ *Lamberton v. Bogart*, 46 Minn. 409.

⁴ *Lane v. De Mets*, 59 Hun. (N. Y.) 462.

⁵ *Walsh v. Mut. L. Ins. Co.*, 133 N. Y. 408.

⁶ *Johnson v. Van Epps*, 110 Ill. 551.

⁷ *Richmond v. Johnson*, 11 Ins. L. J. 215 (Minn.).

⁸ *Bolton v. Bolton*, 11 Ins. L. J. 402 (Me.).

⁹ *Supreme Lodge v. Morgan*, 15 Ins. L. J. 529 (Mo.).

¹⁰ *Grand Lodge v. Elsner*, 26 Mo. Ap. 108.

¹¹ *Vivar v. Knights of Pythias*, 52 N. J. L. 455.

his reputed wife without the performance of any marriage ceremony, and she was named as beneficiary in the policy, though as Mrs. B. instead of Mrs. A., it was held that she took as his wife.¹ Where the wife is designated in a beneficial company whose by-laws provided that payment should be made to "the person designated before death," or the insured's "widow, child, or children, mother, sister or sisters, etc.," and in the order named, if not otherwise directed by the deceased previous to death, it was held on the death of the insured, who had married again after this wife's death, that the designation of the first wife was revoked by death, and that the second wife took.² The wife's adultery does not deprive her of rights in the policy. In the matter of *Anne Walker*,³ the Lord Chancellor, Sugden, remarked: "as to the conduct of the wife, the consequence of the elopement by her with an adulterer is that she forfeits her dower, but that is by the Statute of Westminster the second; the husband does not forfeit the estate by the curtesy, nor the wife her jointure by adultery." A divorce *a mensa et thoro* will not prevent her from recovering on a policy taken for her benefit.⁴ Nor does a divorce *a vinculo matrimonii* determine her interest,⁵ unless the charter or by-laws of the insurer specially provided that the insurance shall only be paid to a certain designated class, as one of a family, or dependents, etc., in which event a divorced wife would not come within such class, and therefore could not take.⁶

583. When the policy enures under a statute to the separate use of the wife and for the children,⁷ or where the policy is designated for the benefit of the wife and children,⁸ it has been held in certain Courts that the wife and children take equally. Though one of the English Judges thought in the former case that the wife took a life

¹ *Watson v. Centennial Mut. L. Ass'n*, 14 Ins. L. J. 73 (Mo.). *v. Mason*, 14 R. I. 583; *Conn. Mut. L. Ins. Co. v. Schafer*, 94 U. S. 457.

² *Riley v. Riley*, 75 Wis. 464; *Masonic Mut. Relief Ass'n v. McAuley*, 2 Mack. (D. C.) 70. Though see *Day v. Case*, 43 Hun. (N. Y.) 179. ³ *Tyler v. Odd Fellows' Mut. Relief Ass'n*, 145 Mass. 134.

⁴ *Lloyd & G. (Temp. Sugden)*, 135.

⁵ *Supreme Council v. Smith*, 45 N. J. Eq. 466.

⁶ *Phoenix Mut. L. Ins. Co. v. Dunham*, 46 Conn. 79; *McKee v. Phoenix Ins. Co.*, 28 Mo. 383; *Ætna L. Ins. Co.*

⁷ *Seyton v. Satterthwaite*, 56 L. J. R. Ch., n. s. 775; *Mellor's Policy Trusts*, 7 Ch. D. 200; *Conn. Mut. L. Ins. Co. v. Baldwin*, 15 R. I. 106.

⁸ *Felix v. Grand Lodge*, 31 Kan. 81; *Cragin v. Ib.*, 66 Me. 417; *Jackman v. Nelson*, 147 Mass. 300.

estate and the children a remainder.¹ But in *Re Davies' Policy Trusts*,² this opinion was not followed, and the proceeds of a policy on the husband's life for his wife and child, under the Act of 1870, was held to go to all as joint tenants. And the same result was reached in Massachusetts, under the Massachusetts Act of G. S., c. 580, 62.³ In *McLin v. Calvert*,⁴ it was held where the widow and children are named, but not the proportion which each should take, that the statute of intestacy applies. In Georgia, the Court stated that a policy on the husband's life for the benefit of his wife and children, under the charter of the Masonic L. Ins. Co. of Macon, entitled the widow to the proceeds of the policy, partly in trust for her children dependent on her and partly for herself. "Taking into view the object and purpose of the Masonic system of insurance," said Bleakley, J., "we think the respective shares of the widow and children might be either equal or unequal according to circumstances. Equality would not necessarily be the rule of division or appropriation. Among the children themselves there might be inequality, resting on their comparative ages, health, strength, etc. So between the widow and any given child inequality might rest on the like circumstances, and perhaps others."⁵ In North Carolina, a by-law directed that payment should be made "to the widow . . . for the benefit of herself or the dependent children of the deceased," and an executor could be appointed to distribute; there was a clause against disposal "by will or otherwise so as to deprive his widow, or his dependent children of its benefits," and the widow owned \$2000 of property; and it was held that a bequest of a policy of \$4000, giving the widow \$1000, and the rest to children was not unreasonable under the above clause.⁶ In Kentucky, where the charter of a society allowed a member to will the policy money for the benefit of his wife and children equally, where there are no such directions the money should not be divided equally, and it was intimated that the widow would take one third, according to the statute of distributions; for it is obvious that the member

¹ *Adam's Policy Trusts*, 23 Ch. D. 131 Mass. 294; *Troy v. Sargent*, 132 525. Ib. 408.

² [1892] 1 Ch. 90. See also *Re Seyton*, 34 Ch. D. 511.

⁴ 78 Ky. 472.

⁵ *Fletcher v. Collier*, 61 Ga. 653.

³ *Morris v. Mass. Mut. L. Ins. Co.*,

⁶ *Roberts v. Roberts*, 64 N. C. 695.

cannot give by will, more than the charter allows.¹ In Illinois, where the policy money "was to be paid as a benefit to the insured's wife A. and children equally," and in Kentucky, on a very similar policy, it was held that the money belonged to the wife and children as a class, and on the death of one of the children before the insured, that the wife and surviving children would take the fund as against the insured's representative.² And in a policy for the wife and children under the English Act of 1870, it was held that a child who died before the insured took nothing.³ Other Courts, however, held that the deceased child's share would go under the intestate law.⁴ In Michigan, a man in contemplation of marriage devised half of his estate to his betrothed, and the rest in trust for his father's family; and after his marriage and death there were born twin posthumous children, who died. He had taken a policy, not subject to debts nor to his general administration of his estate, and it was held under the statute of descent of Michigan, that the wife took one-third of the fund from each child, and one-half of the remainder under the will.⁵ A policy payable to "my wife A. and children" has been held to include a child by a former wife.⁶ But in Rhode Island, where there were four children by a former wife at the issue of the policy, and one by the second wife born later, it was held the wife and four first-mentioned children only took.⁷ Though in England, it was decided that a child born after the issue of a policy for the wife and children would take, under the Married Woman's Act of 1870, because it arrived on the scene before the fund was distributed after the declaration of trust.⁸ In Indiana, a policy payable to the insured's executors, etc., for the benefit of his wife, will, on his death after her, be divided between his representative and his children, under the intestate law.⁹

¹ Ky. Mut. Mason. Lodge Ins. Co. v. Yates, 9 Ins. L. J. 572 (Ky.). And this is now apparently settled; see Kelley v. Ball, 19 S. W. 581 (Ky.).

² Covenant Mut. L. Benef. Ass'n v. Hoffman, 110 Ill. 603; Robinson v. Duvall, 9 Ins. L. J. 897 (Ky.).

³ Seyton v. Satterthwaite, 56 L. J. R., Ch., n. s. 775.

⁴ See Johnson v. Hall, 55 Ark. 210; Conn. Mut. L. Ins. Co. v. Baldwin,

15 R. I. 106; Macauley v. Cent. Nat. Bk., 27 S. C. 215.

⁵ Supreme Council v. Firnaue, 50 Mich. 82.

⁶ Koehler v. Centen. Mut. L. Ins. Co., 66 Iowa, 325; McDermott v. Centen. Mut. L. Ins. Co., 24 Mo. Ap. 73.

⁷ Conn. Mut. L. Ins. Co. v. Baldwin, 15 R. I. 106.

⁸ Seyton v. Satterthwaite, 56 L. J., Ch., n. s. 775.

⁹ Harley v. Heist, 86 Ind. 196.

584. In Massachusetts, under the Act of 1844, c. 82, s. 1, a policy for a married woman, on her predeceasing her husband, vests in her representative for the sole benefit of the children.¹ In North Carolina, a policy for the insured's wife and children on her predecease goes to the husband as heir of his wife, and to the children.² In certain States, a policy payable to the wife if living, but if not living at her husband's death, to her children, goes, on her predeceasing her husband, altogether to the children.³ In Connecticut, where a policy was taken by the wife on her husband's life payable to herself, if living, but if not to her children, it was held on her death before the husband, who died after the death of one of the children, that the grandchild of the insured took up to its parent's portion.⁴ In Kentucky, the right of the insured to appoint, if no "child" and "children," was held to include a grandchild.⁵ But in Rhode Island, where the by-laws of the society provided the money should be paid to the widow if one, then to the child or children, it was held the words child or children would not include grandchildren.⁶ And in Alabama, on a policy to the wife, but if she predecease, to her children, if before the wife's predecease a child dies its child will not take, but the surviving children only are entitled;⁷ though *quere* where the child died before the insured, but survives its mother.⁸ A policy by the husband payable to his wife, but in the event of her death to "their children," was held not to include the children of a second marriage.⁹ And in one of the lower Courts in New York, it was held that a policy for the wife B. and children, providing that in case B. predecease him, the money shall go to "their" children, and she dies leaving a child, and A. marries again and begets another child,

¹ *Swan v. Snow*, 11 Allen (Mass.), 224.

² *Duvall v. Goodson*, 79 Ky. 224.

³ *Simmons v. Biggs*, 99 N. C. 236; *Hooker v. Sugg*, 102 Ib. 115.

⁴ *Winsor v. Odd Fellows' Benef. Ass'n*, 10 Ins. L. J. 390 (R. I.).

⁵ *Continen. L. Ins. Co. v. Webb*, 54 Ala. 688; *Martin v. Aetna L. Ins. Co.*, 73 Me. 25; *Brown's Ap.*, 125 Pa. St. 303.

⁶ *Continen. L. Ins. Co. v. Webb*, 54 Ala. 688; *Russell v. Russell*, 64 Ib. 500. See also *U. S. Trust Co. v. Mut. Benef. L. Ins. Co.*, 115 N. Y. 152.

⁷ *Conn. Mut. L. Ins. Co. v. Palmer*, 42 Conn. 60. See *Hull v. N. Y. L. Ins. Co.*, 62 How. Pr. (N. Y.) 100.

⁸ *Continen. L. Ins. Co. v. Webb*, 54 Ala. 88.

⁹ *Evans v. Opperman*, 76 Tex. 293.

would go to the wife B. and her child as the sole beneficiaries.¹ In Maine, a policy by the husband for the sole use and benefit of a second wife vests on her predecease in her heirs, and the husband's children by a former wife will not take while any issue of the second wife survives.² Though if the second wife and her children die before the insured, then the beneficial interest is in him, which by the statute will go to his children by the first wife.³ But in Minnesota, where the policy is by the husband for his wife A. if then living, otherwise "to his" children, and after her death he takes a second wife, by whom he had one child, it was held that the children of both venters were included.⁴

585. In New York in *Moehring v. Mitchell*,⁵ where the husband, mother, and daughter perished together at sea, it was held there was no authorized or legal presumption that the daughter survived her mother, or the mother her husband, and therefore a policy under the Act of 1840 of New York, payable to the wife on her husband's death, but to her children if she predeceased him, would be like any other contract of the wife's made during coverture, and the personal representatives of the husband would take the money; for unless there is a presumption that the daughter survived her mother, she would not take, nor, unless a presumption arose that the mother survived her husband, would she take. And in Massachusetts, in *Fuller v. Linzee*,⁶ on a similar policy, where the husband, wife, and child perished in the same way, it was held that for the wife to maintain her right she must affirmatively show that she died after her husband; for it was said there was no presumption in law that she did, nor was there any presumption that the child survived its parent, therefore the money should go to the husband's representative. Where a policy under the New York Act of 1840 issued to the wife on her husband's life, for her sole use payable to her, her executors, etc., and in case of her prior death before her husband to her children, etc., it was held on her prior death leaving no child that the policy passed to her representatives, and not to her husband.⁷

¹ *Lockwood v. Bishop*, 51 How. Pr. (N. Y.) 221.

² *Libby v. Libby*, 37 Me. 359.

³ *Ib.*

⁴ *Ricker v. Charter Oak L. Ins. Co.*, 27 Minn. 193.

⁵ 1 Barb. Ch. N. Y. 264, affirmed, 3 Den. (N. Y.) 610.

⁶ 135 Mass. 468. See *post*, § 843.

⁷ *Roe v. Mut. L. Ins. Co.*, cited Bliss

586. The designation of the beneficiaries as the "children of A. B." is sufficiently precise.¹ The share of a child predeceasing its father, under a policy to him payable to his children, has been held to go under the intestate law to the child's heirs, etc.² And if to a single child, who died before its father, to its representatives, though the father kept it up and retained it in his custody till his death.³ In Maine, a policy by the father payable in trust for his minor child, vests in the trustee on his death, and does not constitute a part of the paternal estate.⁴ In Canada, in *Wicksteed v. Monroe*,⁵ where A. insured for the benefit of his daughter, who intermarried with the plaintiff, and predeceased her father, having bequeathed the policy to her husband in trust for their daughter; and A. after his wife's death had married the defendant prior to his daughter's marriage, and died leaving a widow and a child, it was held that under the Canada Act the policy formed a part of his personal estate and was payable to the defendant. In Nova Scotia, a policy to A. payable at the end of thirty years to him if he should live so long, otherwise to his father, who also signed the application, on A.'s subsequent marriage and death after B. within thirty years, was held to go to B.'s administrator.⁶ In Scotland, certain policies were taken by a father on his son's life for himself and his wife payable to both or the survivor, their, his, etc., executors, etc., and after the father's death the widow kept up the policies, who by a settlement was entitled to the use of the whole estate. It was provided on the death of both that the estate should be divided into parts, one of which was to keep up the policies, and it was also provided on the son's death that his widow should have a life estate and the children an absolute interest in the policies. It was held, on a construction of the deed, that the intention was to take the policies for the benefit of the son's family, and that at their father's death their actual value formed part of his movable estate in estimating legitim.⁷ In a certificate to a member payable to a son and daughter, if living, if not to the heirs of the member, and that

¹ *Brooklyn L. Ins. Co. v. Bledsoe*, 52 Ala. 538.

⁵ 13 Ont. Ap. 486.

² *Shields v. Sharp*, 35 Mo. Ap. 178; 210.

⁶ *Mumford v. Mumford*, 19 Nov. Scot.

Hooker v. Sugg, 102 N. C. 115.

⁷ *Chalmer's Trustees*, 9 C. S. C. (4th Ser.) 743.

³ *Glanz v. Gloeckler*, 104 Ill. 573.

⁴ *Cables v. Prescott*, 67 Me. 582.

in case of the death of either the survivor was to take, the words were held to mean that if a survivor be a beneficiary, and "if living" at the donor's death, he was to take.¹

587. An adopted child may take under the designation of "child," if it appear that it was intended to be the beneficiary. As where the policy was to the wife if she survived, and otherwise to their children, and she predeceased her husband, and there was only an adopted child, who had been adopted when the policy was issued.² But in *Black v. Castle*,³ where A., a married man, who had insured for the benefit of his surviving children, and then adopted B. under an agreement with her mother, which he did not record as required by the Code, it was held that the adopted child B. could not take as a surviving child of A., though it was not decided that she could have done so had the adoption been recorded.

588. It was held in Ohio, under the general Act of Incorporation of Beneficial Societies, strangers cannot be beneficiaries.⁴ In Massachusetts, in a society formed under the Act of 1882, s. 2, c. 195, a mother may be designated as beneficiary, as coming within the class widows, orphans, or relatives.⁵ Nor would she lose her benefit by the insured's subsequent marriage.⁶ When the benefit is limited to the insured's "family," or it is designated as beneficiary, this implies those living together in one household in some kind of social equality. The "family" need not necessarily be related by blood to the insured.⁷ Nor would a near relative living away be one of his "family."⁸ Where the constitution of the association provided "That it should have for its object the payment of the money to the 'family of the deceased member,' which should be paid 'to his legal representatives or to such person or persons as he may have designated or appointed in writing . . . ; provided always that when such member shall leave a widow or children, he shall have no power to deprive her or them of the benefit specified in this article by will or otherwise, but the same shall be paid to her or them absolutely,'"

¹ *Un. Mut. Ass'n v. Montgomery*, 70 Mich. 587.

² *Martin v. Ætna L. Ins. Co.*, 73 Me. 25.

³ 7 *Hawaiian Islands*, 273.

⁴ *State v. Cent. Oh. Mut. Relief Ass'n*, 29 Oh. St. 399.

⁵ *Loos v. John Hancock Mut. L. Ins. Co.*, 41 Mo. 538.

⁶ *Mass. Catholic Order of Foresters v. Callahan*, 146 Mass. 391.

⁷ *Carmichael v. Northw. Mut. Benef. Ass'n*, 51 Mich. 494.

⁸ *Tyler v. Old Fellows' Mut. Relief Ass'n*, 145 Mass. 134.

and an application was had in favor of a niece, with whose family he was then living, but at the time of death he left a married daughter, it was held, as the company had accepted the application for the niece, and as the contract was then complete, that it must pay to her.¹ But where A. designated as beneficiary his "family," which then consisted of himself, his wife, and daughter; and the daughter died, leaving a husband and children, all of whom lived with A. till the daughter's death, when they went elsewhere, it was held that the wife only would take.²

589. The insured's mother is not necessarily "dependent" on him.³ Nor is a sister;⁴ or a betrothed;⁵ or a creditor;⁶ and it has been held that the word "dependent" does not include the member's mistress with whom he cohabits, if he has a legal wife living at his death whom he had abandoned.⁷ But a betrothed who is partially supported by her "intended" may be termed a "dependent."⁸ For a "dependent" is not one without any visible means of support, but may be one who depends on another for the completion of her means of livelihood.⁹

The constitution of a society provided that the insurance should go: first, to wife or children, subject to section 6, which stated that the insured could bequeath half to one or all his children, but the widow must at least get half; secondly, if there was no widow, the children could take all, and no other could take unless a member should have designated him. A., unmarried, appointed in writing his uncle and aunt, and later married, leaving a widow. The uncle and widow claimed, and it was held the widow took, because she was left nothing, and in any event she was entitled to one-half; and the fact that she married him subsequently to the designation was not material.¹⁰ Where the charter stipulated that "if the designation was changed by death or otherwise impossible, it shall go to the widow, etc.," and the insured had designated his brother, who died,

¹ Folmer's Ap., 87 Pa. St. 133.

⁷ Grand Lodge v. Elsner, 20 Mo. Ap.

² Brooklyn Mason. Mut. Relief Ass'n 108.

v. Hanson, 53 Hun. (N. Y.) 149.

⁸ McCarthy v. Supreme Lodge, 153

³ Elsey v. Odd Fellows' Mut. Relief

Mass. 314

Ass'n, 7 N. East. R. 844 (Mass.).

⁹ Alexander v. Parker, 42 Ill. Ap.

⁴ Supreme Council v. Perry, 5 N.

455.

East. R. 634 (Mass.).

¹⁰ Sanger v. Rothschild, 50 Hun. (N.

⁵ Ib.

Y.) 157.

⁶ Ib.

and then his own widow, the Court held that she took in any event, as she was within the above clause, but did not pass on the question as to whether a second designation was good or ill, after the first had been exhausted.¹

590. In Massachusetts, on an illegal designation in a benevolent society formed under the Act of 1874, c. 375, all the persons who could take by the constitution being dead, it was held that the money went to the insured's representatives.² In *Britton v. Supreme Council*,³ the policy-money was for a special class of relatives, to be paid as a member "may direct." There was a clause also to the effect that if his appointee died first, the fund was to go to his legal dependent heirs, and if none, then to the Order; one directed illegally, and it was held from the general scope of the purpose of the society that the fact of a misdirection entitled his heirs to take.

In beneficial societies organized to assist certain classes of people, as relatives or dependents of the insured, it is usually provided that the society shall pay to his nominee within that class; but on his failure to appoint at all, the regulations of the society or the charter point out, usually directly or indirectly, the beneficiaries who are then entitled; and as a general rule the money is not payable to the insured's executor, etc., as assets of his estate.⁴ In *Winterhalter v. Workmen's Guaran. Fund Ass'n*,⁵ a policy in such a beneficial body provided that it should be paid subject to the will of the insured, but no beneficiary was designated. He bequeathed his entire estate to A., subject to the payment of his debts, and it was held that the company should pay the insurance-money to the executor, without joining A., as she had not been specifically made the beneficiary, but only as legatee after the payment of debts. In *Bock v. Ancient Order of United Workmen*,⁶ there was a schism in the Order, and the insured continued to pay dues to the old Lodge till death. He also paid dues to a new Lodge, which claimed to be the real one, and therefore that a new certificate was not necessary

¹ *Van Bibber v. Van Bibber*, 82 Ky. 347. *Bush* (Ky.), 489; *Jewell v. Grand Lodge*, 41 Minn. 405; *Ballou v. Gile*,

² *Daniels v. Pratt*, 143 Mass. 216. 50 Wis. 614; *Smith v. Covenant Mut.*

³ 46 N. J. Eq. 102. *Benef. Ass'n*, 24 Fed. R. 685 (E. D.

⁴ *Ashby v. Costin*, 21 Q. B. D. 401; *Wis.*)

Highland v. Ib., 109 Ill. 366; Ky. ⁵ 75 Cal. 245.

Mason. Mut. L. Ins. Co. v. Miller, 13 ⁶ 75 Iowa, 462.

because it was such ; all of which the insured knew. On his death the money on the certificate was paid by the old Lodge, and the new Lodge declined to pay because the widow could not surrender the certificate. Held, there was but one certificate of insurance, and that it had been paid ; and the widow could not recover a second insurance. She could have been perhaps paid by either which she had elected, but not twice.

591. A contract of insurance is made to run during a specified time, but it need not necessarily be a determinate number of units of time, for the parties may agree, for instance, that the insurance shall attach till either one elect to terminate it.¹ Where no time is specified for the duration of the policy, it will be implied that the parties contract for a fairly reasonable continuance after its issue.² A policy bearing date the day the premium is paid takes effect by relation back from that day, although not delivered until several days afterwards.³ And where a policy is delayed for non-payment of the premium, it relates back to the date of the policy and application.⁴ For an after-paid premium relates back to the original time for payment.⁵ A "month" is computed as a lunar month in legal matters, but as a calendar month in commercial.⁶ Twelve months have been held to be a year, and not twelve periods of twenty-eight days.⁷ A policy for a year, dated as of a specified day, includes the whole day bearing the same date at the close of the year, as a day is not divisible into fractions.⁸ Where the accident occurs at a distance where time is different, owing to the difference of longitude, it was considered by the jury that the hour of expiration of the policy should be measured by the local time of the office where the policy was taken, and not by the local time where the accident occurred.⁹

¹ *Imboden v. Detroit F. & M. Ins. Co.*, 31 Mo. Ap. 321.

² *Schroeder v. Trade Ins. Co.*, 109 Ill. 157.

³ *Lightbody v. N. Amer. Ins. Co.*, 23 Wend. (N. Y.) 18.

⁴ *Blumer v. Phoenix Ins. Co.*, 45 Wis. 622.

⁵ *Buckbee v. U. S. Ins., Etc., Co.*, 18 Barb. (N. Y.) 541.

⁶ *Hart v. Middleton*, 2 C. & K. N. P. 9.

⁷ *Martin's Case*, *Fowler's History of Insurance*, p. VI.

⁸ *Howard's Case*, 2 Salk. 625. See *Herald Co. v. North. Assur. Co.*, 4 L. R. Sup. Ct. (Montreal) 254.

⁹ *Schofield v. Jones*, 2 Ins. L. J. 640, b (Great Britain).

592. In *Isaacs v. Royal Ins. Co.*,¹ a policy on goods for six months provided that from the 14th of February, 1868, until the 14th of August, 1868, and for so long after as the assured should pay the premium, and the defendants at the time above mentioned accept it, goods would be covered. The plaintiffs intended to keep up the policy, and the defendants knew their intention; but the renewal premium was not paid on the 14th of August, 1868, on which day a fire took place. And it was held that under the terms of the policy the whole of the 14th of August was protected, and that the defendants were, therefore, liable for loss caused by a fire happening on that day. In *Connell v. Scot. Commer. Ins. Co.*,² the policy was to be good "until February 28, 1871, and no longer." A clause was indorsed that the policy was to be continued on the payment of premiums "within fifteen days after the day limited upon forfeiture of the benefit;" and it was held that the original insurance ended on February 28th. Where the policy is for a year, although the person whose life is insured is stricken with a fatal disease during the continuance of the year of insurance so as to be in a dying condition, this is not sufficient to establish the loss insured against; if he actually survives the close of the year, the insurer is not held.³ In *Perry v. Prov. L. Ins., Etc., Co.*,⁴ there was a policy from noon of the day of its date for a period of "twelve months" to noon of the day of its expiration, against loss of life, on proof "that the assured, at any time after the date hereof and before the expiration of this policy, shall have sustained personal injury caused by any accident," "and such injuries shall occasion death within ninety days from the happening thereof." An accident happened at 9 A. M. which caused death at the same hour on the ninety-first day thereafter, excluding the day of the date of the accident, the whole period being within the twelve months: Held, there could be no recovery. In a similarly entitled suit between the same parties,⁵ in addition to the above clauses, there was the added clause "against personal injury in the sum of \$10 per week, for a period not exceeding altogether twenty-six weeks for any single accident, within the meaning of this policy and the conditions hereto annexed, by which the assured shall

¹ L. R. 5 Exch. 296.

⁴ 99 Mass. 162.

² 3 Ins. L. J. 536 (Great Britain).

⁵ 103 Mass. 242.

³ *Howell v. Knickerbocker L. Ins. Co.*, 44 N. Y. 276.

sustain any personal injury which shall not be fatal." And it was held that the weekly sum was due for an injury which did not occasion death within the ninety days, although finally fatal; for the two provisions were to be construed together, and the intent was that an injury should fall within either the first or last clause. In *S. Staffordshire, Etc., Co. v. Sickness & Acc. Assur. Ass'n*,¹ the policy was against "claims for personal injury by vehicles for twelve calendar months from November 24, 1887," to the amount of "£250 in respect of any one accident." On November 24, 1888, there was an accident to people which made the insured liable in £833 damages. It was held that, in the computation of time, November 24, 1887, should be excluded, and November 24, 1888, included by the use of the word "from," and that "accident" meant where a man could claim compensation for an injury; and consequently that the liability of the insurers was not limited to £250. Where a policy was made on June 10, 1877, for one year, and on June 19, 1878, a policy from June 10, 1878, for one year, was issued on an application for renewal made June 13th, it was held that a loss on June 16, 1879, was not covered.² A verbal agreement made in October to issue a policy for twelve months in the early part of November (the old policy ending on November 5) covered a loss on the 19th of November.³

593. At times the duration of the policy is made not only to depend upon specified dates, but is contingent upon the existing of some other fact at the same time. A risk of fire on shore for ten days prior to shipment has been held to mean a fire on shore while awaiting shipment, within ten days after the issue of the policy.⁴ Where a policy was issued upon plaintiff's "hop-house while drying hops," from August 15 to October 15, 1875, and the hop-house was destroyed by a fire within the time specified, but after the plaintiff had ceased drying hops, it was held that the insurer was not liable, for the insurance was only to cover the property "while drying hops," not from date to date, as otherwise the words would be meaningless.⁵ Where the insured goods were contained in cars of the A. R. R.

¹ [1891] 1 Q. B. 402.

² *Fuchs v. Germantown Farmers' Mut. Ins. Co.*, 60 Wis. 286.

³ *Home Ins. Co. v. Adler*, 71 Ala. 516; 77 Ib. 242.

⁴ *F. Ins. Ass'n v. Merch., Etc., Trans. Co.*, 66 Md. 339. See *Lancaster Mills v. Merch. Cotton Press Co.*, 89 Tenn. 1.
⁵ *Langworthy v. Oswego & Onondaga Ins. Co.*, 85 N. Y. 632.

Co., which were placed on tracks on a Y at a junction belonging to the B. R. R. Co., which was built for common use, in order to transfer over to the C. R. R. Co., it was held that the A. Co. was liable till the cars had been hauled by the C. Co. to receive the goods, and they had been received by the clerk of the receiving company and checked off in the usual way.¹

594. The payment of a partial loss does not terminate the insurance on a policy, whose term has not ended, or which is perpetual.² A stipulation that when and so often as the property insured, or any part thereof, or any other of equal value built or supplied in the room thereof, shall happen to be injured, such damages shall be made good, was held to apply to partial losses, and to property supplied or built by the insurer in the place of what had been destroyed.³

595. In *Mercantile Ins. Co. v. Jaynes*,⁴ where a policy was made by error to expire on a certain date, as alleged, it was held that an indorsement containing a different date, unsigned, and in no way proved as to place or time, was inadmissible to rectify the error. But where the application was for five years from August 1, 1854, and the policy described as ending in 1854, the fact that the policy was expressed to be "from the first of August, 1854, to the first of August, 1854," was held clearly only a clerical error which would be corrected.⁵

596. The description in the policy of a building insured, or of the locality where the personalty insured is, or is to be kept, as a general rule, must be accurate, or the insured cannot recover.⁶ In the case of doubtful language the policy will be construed against the insurer.⁷ But the language of the policy may be so inaccurate or obscure that the particular subject-matter cannot be identified at all, in which case the insured cannot recover. The rule of construction has been laid down in a certain case somewhat in the

¹ *Ky. M. & F. Ins. Co. v. R. R. Co.*,
6 Ins. L. J. 372 (Tenn.).

² *Lattomus v. Farm. Mut. F. Ins. Co.*, 3 Hous. (Del.) 404; *Trull v. Roxbury Mut. F. Ins. Co.*, 3 Cush. (Mass.) 263.

³ *N. H. Mut. F. Ins. Co. v. Rand*, 24 N. H. 428.

⁴ 87 Ill. 199.

⁵ *Liberty Hall Ass'n v. Housatonic Mut. F. Ins. Co.*, 7 Gray (Mass.), 261.

⁶ *Wilson v. Herkimer Co. Mut. Ins. Co.*, 6 N. Y. 53; *Severance v. Continen. Ins. Co.*, 5 Biss. 156 (N. D. Ill.).

⁷ *Franklin F. Ins. Co. v. Updegraff*, 43 Pa. St. 350.

following terms: If the description in a policy of insurance against fire, which is evidently intended to apply to one of two buildings, be false in one particular when applied to one building, and false in a different particular when applied to the other, the policy will attach to that building which, after rejecting as surplusage that part of the description which is false when applied to it, is the most clear and sufficient, provided the building is sufficiently identified by the residue of the description; and in considering with a view to the adoption of the one or the other of the two hypotheses, which of the two particulars of the description to reject as false, the Court will have regard to their relative descriptive importance, but if the residue of the description, after rejecting each of the particulars as false, do not in either case sufficiently identify the building intended to be insured, the policy will be void for uncertainty.¹

597. In the case of a latent ambiguity parol evidence is admissible to show what building, etc., is intended. As where it is doubtful which of several barns, where insured hay is kept, is meant.² And evidence has been admitted to show that a "fishing scow" was covered by a policy on a "building."³ A policy against accident on plate glass contained a clause that the glass in windows and doors the dimensions of which are nine feet or more is not covered. Held, a plate glass front of a building which was immovable, though of greater dimensions, was covered.⁴ A description that the property in the policy was between "Arch and Leade Streets," which, in fact, was between "Ash and Meade Streets," was held immaterial, as the locality was otherwise determinable.⁵ And in an insurance on property in the Overland Free Warehouse, situate N. E. cor. of Third and King Streets, San Francisco, the fact that the building was styled Overland Free Warehouse No. 1, instead of "No. 2," as it could otherwise be identified by boundaries, was thought not important.⁶ In insurance on large stores, elevators, factories, which often consist of more than one building, disputes often arise between

¹ *Heath v. Franklin Ins. Co.*, 1 Cush. (Mass.) 257.

⁴ *Hale v. Springfield F. & M. Ins. Co.*, 46 Mo. Ap. 508.

² *Bowman v. Agricultural Ins. Co.*, 59 N. Y. 521; *Lycoming Mut. Ins. Co. v. Sailer*, 67 Pa. St. 108.

⁵ *Yonkers, Etc., Ins. Co. v. Hoffman F. Ins. Co.*, 6 Rob. (N. Y.) 316.

⁶ *Hatch v. New Zealand Ins. Co.*, 67 Cal. 122.

³ *Enos v. Sun Ins. Co.*, 67 Cal. 621.

the insured and the insurer as to what particular building, or as to how much of a building, the policy is intended to apply. In a policy on goods in letter "C," Patterson's stores, which stores formed a solid block of buildings divided for safety by solid walls into non-communicating sections, which were known by the letters A, B, C, etc., and the goods lost were in "A," it was held that the insured could not recover.¹ Where the policy was on goods in the building Nos. 317-19, St. Paul's Street, to which there was an entrance in No. 317 for the office and warehouse, and in No. 319 for workmen, and Nos. 317 and 319 were connected through an upper floor of No. 315, leased for that purpose, which was owned by a stranger, the entrance below not being used by the occupiers of 317 and 319, and the communication could not be visible from the outside, nor was it proved that the insurer knew about it, it was held that there could be no recovery for a loss in No. 315.²

598. Where the policy was on an "elevator buildings and additions," and there was a warehouse a couple of feet distant from the elevator attached thereto by boards nailed to both, which was used for the storage of grain received into the elevator, that was conveyed from it by spouts to the warehouse, and was discharged from the latter by a conveyance underneath through the former, it was held that the latter was covered.³ Where the insurance was on grain "in St. Anthony's Elevator," \$4000 on grain, their own or in trust, etc., while contained in the frame, iron-clad, metal-roof building, occupied for storage and handling of grain, and known as the "St. Anthony's Elevator," and the elevator was constructed in several parts, though designated and operated as one structure, the main structure being called "main elevator building," and the addition, which was similarly constructed and equipped and connected with it by covered ways, called Annex A, and the entire property was known as "St. Anthony's Elevator," it was held that the whole structure was covered.⁴

599. The term "factory" in a policy may include more than one

¹ *Bryce v. Lorillard F. Ins. Co.*, 55 N. Y. 240. 33 Minn. 90. See *Allen v. Lafayette Ins. Co.*, 34 La. An. 763.

² *Rolland v. North Brit. & Mercant. Ins. Co.*, 14 L. Can. J. 69.

⁴ *Pettitt v. State Ins. Co.*, 41 Minn. 299.

³ *Cargill v. Miller's Mut. Ins. Co.*,

building.¹ And it has been said that a mill, within the meaning of a policy, is not necessarily merely a place where something might be ground, nor a manufactory merely where something may be made by hand or machinery, but what common usage recognizes as a mill or manufactory respectively.² And if shown by the context to have been intended, a mill may mean a manufactory.³ In *Meadowcraft v. Standard F. Ins. Co.*,⁴ a policy was on machinery, consisting of cards, pickers, etc., "contained in the first story of a four-story and basement brick building, etc." The pickers were in a one-story structure of brick, the floor being on a level with the first story joining the main building, the entrance being through a frame building adjoining, and then through a large iron door, "as if going from the house into the kitchen." There were no pickers except in the one-story structure, and it was held that the picker-room was part of the first story in which the goods were insured. In *Blake v. Exchange Mut. Ins. Co.*,⁵ a policy on goods in a building on "Main Street," in the town of C, known as D. & Co.'s factory, was held to apply to goods in a wing abutting on the rear of the factory, connected with it by a small aperture in the wall, which was usually closed, but which was generally known and operated as a part of the factory. In *Home Mut. Ins. Co. v. Roe*,⁶ the insurance on a "mill building and addition," and "machinery, including gearing, shafting, etc., therein," was held to cover the contents of an engine-room about twenty feet distant, which furnished the power for the mill, and was connected (by machinery) with the mill, being the only addition. In *Harris v. Aetna Ins. Co.*,⁷ the insurance was on merchandise, machinery, fixtures, etc., contained in a building occupied as a factory and warehouse, Nos. 19 and 21, situate on A. Street, and it was stated "the above premises heated by a furnace in the cellar and connected with the building by wooden bridges from the upper story," and "the above premises are occupied as a tobacco factory." There was tobacco stored in the upper story of a floor of a building in B. Street, which

¹ *Security Ins. Co. v. Farrell*, 2 Ins. L. J. 302 (Ill.).

² *Franklin F. Ins. Co. v. Brock*, 57 Pa. St. 74.

³ *Carlin v. West. Assur. Co.*, 57 Md. 515.

⁴ 61 Pa. St. 91.

⁵ 12 Gray (Mass.), 265.

⁶ 71 Wis. 33.

⁷ 1 C. S. C. R. (Oh.) 361.

was occupied, and known to be so by the agent as part of the factory and warehouse, being connected with it by a wooden bridge, and the above upper floor was only accessible from A. Street. Held, parol evidence was admissible to show the tobacco in the upper floor in B. Street was intended to be covered. In *James River Ins. Co. v. Merritt*,¹ the insurance on a "frame sawmill situated, etc.," "boiler, engine, machinery, and belting contained therein," was held to include a planing machine in a building on the same level or floor with the machinery proper of the mill, about twenty-five feet distant, but connected by belting and all plainly visible. In *Wilson Drug Co. v. Phoenix Assur. Co.*,² a policy to the plaintiffs "on their wholesale stock of drugs, paints, oils, etc., and other goods on hand . . . contained in the building," was held to apply to the goods in both the wholesale and retail departments in the building. In *Ætna Ins. Co. v. Att'y Gen'l*,³ the policy was to the trustees of an insane asylum at London, Canada, on the "main building." There was a centre building with a kitchen, laundry, engine-room to the rear, connected by a brick-walled covered way and built of the same material; and it was held that the outbuildings were covered. In *Liebenstein v. Baltic F. Ins. Co.*,⁴ a policy on stock "contained in a chair factory in A. Street" was held to include stock in the main building and in the engine buildings appurtenant to and connected with it by a platform of belting of machinery, both being necessary for the factory. In *Wash. F. Ins. Co. v. Symington*,⁵ a policy which, after enumerating insurances on two other buildings, stated the present insurance to be on a brick and frame building, situate south of the above-named buildings, and used as a sulphuric acid manufactory; \$3500 on stock; \$225 on machinery, including apparatus "in and out of the factory, and connected therewith," was held to cover machinery, etc., on the premises used and connected, though not necessarily physically, with the acid manufactory, both in the other buildings, in the sheds, or in the open air.

600. *Hews v. Atlas Ins. Co.*⁶ is an illustration of a policy intended to cover only one particular building of a series apper-

¹ 47 Ala. 387.

² 110 N. C. 350.

³ 18 Duv. (Can.) 707.

⁴ 45 Ill. 301.

⁵ 30 Md. 91.

⁶ 126 Mass. 389.

taining to a manufactory. It appeared that there was a manufactory of pottery on A. Street, consisting of two brick buildings connected by a corridor, one of which with three L's was known as the pottery building and the other as the storehouse. The former contained the engines and most of the machinery, and was sometimes used for storage, the office being in one of the L's; while the latter was chiefly used for storing manufactured articles, though there was also contained in it and used a limited amount of machinery, most of the stock in the course of manufacture being carried to and fro from each building. The policy was issued, enumerating \$500 to be on brick pottery building and L's; \$500 on machinery; \$950 on stock, and \$50 on office furniture, "contained in said building on A. St." Other policies in other companies had been taken on the storehouse and others on the pottery specifically. And it was held that it was obviously only meant to include the pottery building. Where the goods were described as in a "two-story building, Broadway," and there was a rear one-story high, the policy was held to cover goods in both front and rear.¹

601. It often happens after the policy has attached that additions are made to the original structure, which it may be desirable to cover by an insurance when the policy shall be renewed. Whether it will do so is of course a pure question of construction. In *Butterworth v. West Assur. Co.*,² after several insurances, additions were made to the buildings which were permitted by all the insurers but one, and the above insurers also agreed that their policies should apply to merchandise, etc., in the additions. Finally the insurer who had held out also gave a permit to the additions, and added in a fresh sentence "All policies concurrent." And it was held this meant that this insurer would concur with the others in the terms of the permits, that is, that his policy should concur in allowing the addition, and that his policy should attach to the objects therein, for he could not mean to grant a permit if the others did, as he already knew that fact. In *Cit. Ins. & Investment Co. v. Lajoie*,³ there had been a policy on goods on No. 319, and before renewal an extension was made to No. 315, where some of the goods were placed, of which the agent was aware before the

¹ *Carr v. Hibernia Ins. Co.*, 2 Mo. Ap. 466.

² 132 Mass. 489.

³ L. R. 4 Q. B. (Montreal) 362.

renewal, but it was held a renewal in the old terms would not cover the goods in No. 315.

A usage among insurers to limit risks taken on an elevator to a particular building, if the elevator has been recently built, was held inadmissible.¹ Whether the building is fairly covered by the terms of the policy, as far as the facts are concerned, is for the jury.²

602. As a general rule, buildings in the propinquity of the property need not be disclosed unless asked about.³ But where there is a warranty of the correctness of a diagram, or a description of the adjacent neighborhood, this must be accurately complied with.⁴ The following cases illustrate this principle. In *Day v. Conway Ins. Co.*,⁵ there was a condition not to omit any circumstance that should increase the risk, and there was described "a wooden four-story paper mill 60 feet by 70 feet," but no mention was made of a bleach-house 20 feet by 30 feet, separated by a wooden shed known as a salt box, 24 feet by 18 feet in length and breadth, and 4 feet high, the end of the mill forming one end of it and the bleach-house the other. It was declared that there was no building within 300 feet of the mill but a stock house, which was not meant for the bleach-house or salt box. Held, whether the bleach-house and salt box formed a part of the mill or not, there was a breach of the condition. In *Gates v. Madison Co. Mut. Ins. Co.*,⁶ in a policy on a building, to an interrogatory: "How bounded and distance from other buildings if less than ten rods, and for what purpose occupied and by whom?" the insured's answer, "the nearest building east is the dwelling-house occupied by A.; in the north and about five rods distant is a shop used, etc., and on the west, the nearest building to the west end of the barn and shed is the dwelling of B. etc.;" giving correctly the distances to the

¹ *Petit v. State Ins. Co.*, 41 Minn. 299. *v. Chenango Co. Mut. Ins. Co.*, 2 Den. (N. Y.) 75; *Chaffee v. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y. 376; *O'Neill v. Ottawa Agricultural Ins. Co.*, 15 Can. L. J. 207.

² *Southwest Lead & Zinc Co. v. Phoenix Ins. Co.*, 27 Mo. Ap. 446.

³ See *Gates v. Madison Co. Mut. Ins. Co.*, 5 N. Y. 469.

⁴ *Burrit v. Saratoga Co. Mut. F. Ins. Co.*, 5 Hill (N. Y.), 188; *Huntley v. Perry*, 38 Barb. (N. Y.) 569; *Jennings*

amid, 4 L. Can. R. 107.

⁵ 52 Me. 60. But see *Casey v. Gold-*

⁶ 5 N. Y. 469.

nearest buildings. And these were held sufficient answers, and that the presence of other more remote buildings, though within ten rods, did not affect the matter. For the answer was not a warranty that there were no other buildings within ten rods, for the question did not ask for all the buildings, but the distance of the risk from others; and this might be very well understood to mean only the distance from those nearest besides, while the employment in the answer of the word "nearest" implied that there might be others. In Massachusetts, a hog-pen and hen-house, less than sixteen feet high and covered and separated by boards, were held not to be a building within the clause as to buildings.¹ In *Naughter v. Ottawa Agricultural Ins. Co.*,² all buildings within 100 feet were required to be disclosed, and there was a clause that any misrepresentation or concealment, etc., should avoid, and it was held that the omission of a small frame building used as a water-closet was immaterial, though the decision was put on the ground of the agent's knowledge, and that the clause last alluded to only meant fraudulent omission. But where there is a clause as to a "full and true exposition of all the circumstances in regard to the condition, value, and risk of the property" by the insured, an undisclosed carpenter's shop was held to avoid.³ The description in the policy of a building as "detached at least one hundred feet" on a "reasonable construction," was held to mean that it was detached from any exposure which would increase the risk, and therefore a small office seventy-five feet distant, which did not increase the risk, was not considered a breach.⁴ A description of buildings adjoining and communicating, occupied . . . situated detached . . . means, that the buildings were detached as a whole mass from other buildings and not from each other.⁵ The word "contiguous" has been defined to mean adjacent, in actual close contact, touching, near, and a building fifty feet off is not adjacent.⁶ So a building twenty-five feet off has been held not to be "contiguous."⁷ In *Allen v. Charlestown Mut. F. Ins. Co.*,⁸ the application, etc., which was made

¹ *White v. Mut. F. Assur. Co.*, 8 Gray (Mass.), 566.

² 43 U. C. C. B. 121.

³ *Pottsville Mut. F. Ins. Co. v. Horan*, 89 Pa. St. 438.

⁴ *Burleigh v. Gebhard F. Ins. Co.*, 90 N. Y. 220.

⁵ *Broadwater v. Lion Ins. Co.*, 26 N. W. R. 455 (Minn.).

⁶ *Arkell v. Commerce Ins. Co.*, 69 N. Y. 191.

⁷ *Olson v. St. Paul F. & M. Ins. Co.*, 35 Minn. 432.

⁸ 5 Gray (Mass.), 384.

part of the policy and a warranty, stated that there were "two buildings with fifty feet," and it was held that these words meant "within fifty feet," and that though one building was within two feet of the insured they were correct.

603. The introduction of the words "known to the applicant," or "material facts," in the wording of the stipulations may of course modify the construction. In *Dennison v. Thomaston Mut. Ins. Co.*,¹ where the condition was that "no insurance will entitle the insured to any indemnity for loss or damage, if the description by the applicant of the building or property insured be materially false or fraudulent; or if any circumstance material to the risk be suppressed," it was held that the insured, in answer to a question as to other buildings, may omit those that an ordinarily prudent man would not consider dangerous. In *Hall v. People's Mut. F. Ins. Co.*,² the insured, in answer to a request to "state the relative situation as to other buildings," stated the distances, being respectively four and nineteen feet of the two nearest buildings only, and it was agreed that the above, *inter alia*, was a "just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant." Held, that the failure to state the direction of the two nearest buildings, or to disclose other buildings a few feet further off, not known to the applicant nor to his agent who made the application, did not avoid the policy. In *Hardy v. An. Mut. F. Ins. Co.*,³ however, in reply to: "What is the distance and direction from each other and from other buildings and how are such other buildings occupied? Make plan on back hereof, showing the relative position of all the buildings," several buildings were omitted by the insured. The contract provided that "the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant, or are material, and of all the facts inquired for;" and that "the applicant further agrees that the misrepresentation or suppression of material facts shall destroy his claim for damages or loss;" but an article of the by-laws, subject to which

¹ 20 Me. 125. See also *Wilson v. Standard Ins. Co.*, 15 Can. L. J. 32.

² 6 Gray (Mass.), 185.

³ 4 Allen (Mass.), 217.

the policy was issued, stipulated that "any policy issued by this company shall be void, unless the assured shall have made in his application for insurance a true representation of the risk;" and it was held that the omission to state the buildings in answer to the question avoided the policy. In *Satterthwaite v. Mut. Beneficial Ins. Co.*,¹ where a survey was required by the company's surveyor and no questions were asked as to risk, the omission to state a corn kiln attached to the mill, which was material, was held not to avoid.²

604. The applicant's description in the application or policy as to adjacent property, would also appear, as a rule, not to be a promissory warranty that the situation is always to continue unaltered, and a change or erection even by the insured himself has been held not to avoid. In *Stebbins v. Globe Ins. Co.*,³ Oakley, J., in asserting this rule, observed, "It by no means follows that insurers are compelled to bear any loss which may be the result of such an act on the part of the insured. The contract of insurance has its foundation in the mutual good faith of the parties. If the assured violates that good faith, in any circumstances entering into the creation of the contract, it is no doubt void. But if, subsequently to its formation, he acts with fraud, or gross negligence, or in bad faith with respect of the subject-matter insured, his rights under the contract are not impaired, unless the loss which he seeks to recover is the result of his own misconduct. . . . An erection of buildings on vacant ground, by the assured, subsequently to the policy, and contiguous to those insured, whereby the risk is increased, stands upon the same principle. If buildings thus erected should be removed before the occurrence of any loss, it could not be maintained that the policy would be annulled. The act, not being in violation of any express stipulation in the policy, and not resulting in any actual injury to the insurers, the law would regard it as harmless and rightful; and if this be so it seems clearly to follow that the continuance of such erections until the fire, cannot

¹ 14 Pa. St. 393.

² *Wash. F. Ins. Co. v. Davison*, 30 Md. 91; *Howard v. Ky. & Louisville Ins. Co.*, 13 B. Mon. (Ky.) 282; *Stebbins v. Globe Ins. Co.* 2 Hall (N. Y.), 632; *Young v. Wash. Co. Mut. Ins. Co.*,

14 Barb. (N. Y.) 545; *Gates v. Madison Co. Mut. Ins. Co.*, 5 N. Y. 469; *West. Farmers' Mut. Ins. Co. v. Miller*, 1 Handy (Oh.), 325.

³ 2 Hall (N. Y.), 632.

change the legal consequences of the act of erecting them, if they have in no way been the cause of the loss. The act of the assured in erecting them may have been a breach of an implied understanding between the parties, that the situation of the insured premises, with respect of the contiguous buildings, should not be changed by the act of the insured so as to increase the risk; but if such increase of risk has in fact been without injury to the defendants, I hold that the policy is not affected by it." This language of one of the leading cases on the subject is somewhat inartificially expressed and obscure. It was thought by Storer, J., in *West Farmers' Mut. Ins. Co. v. Miller*,¹ that Oakley, J., meant that the insurer would be liable only in the case of the insured's fraud; while in *Howard v. Ky. & Louisville Ins. Co.*,² the Court seemed to think that he intended to include all cases where the loss resulted from the change, and the Kentucky Court apparently approved that position. Whatever the learned Judge may have intended by his language, it is clear that the insured would be responsible in any case for a fraudulent causing of the loss, and it is likewise equally clear that the fact that the structure subsequently erected was instrumental in causing the loss cannot affect the question, as the change of risk, innocent or fraudulent, is always unimportant unless material, and materiality does not depend upon the fact that the loss occurred through the instrumentality of the change, but whether such change, if stated, would have fairly been a moving inducement to the insurer not to take the risk. And therefore, though the judgment may very well be supported on the ground that the description could not fairly be intended to have been promissory or continuing, it could hardly be upheld on any legal principle in the reasoning given in its support. And in later cases the *dicta* of Oakley, J., if not repudiated, have been at least so far modified as to conform to the principles last stated.³

605. When application is made for insurance on a "building," it implies some kind of structure and not a heap of materials.⁴ Though a building while slightly injured by a fire can be insured as a building, and the fact that a loss results from such and a later fire cannot affect the result when a total loss.⁵

¹ 1 Handy (Oh.), 325.

² 13 B. Mon. (Ky.) 282.

³ See *West. Farmers' Mut. Ins. Co. v. Miller*, 1 Handy (Oh.), 325.

⁴ *Hamburg-Bremen F. Ins. Co. v. Garlington*, 509, 66 Tex. 103.

⁵ *Ib.*

. 606. The description of a risk as a five-story brick building is correct without mention of a cellar.¹ And it has been held that a description of a two-story house is not untrue because of a small rear addition of one story.² But where there was a clause as to a correct description, it was held that the omission to state that a wing of a house alleged to contain merchandise contained also a kitchen, is fatal.³ Where a policy, issued on a survey of a building, part of which was to be erected, it was held that parol evidence was admissible to show that the company knew that it was in contemplation and was intended to be averred when the survey was made.⁴ And where, after the issue of a policy, the insured stated at the office, *bonâ fide*, that the insured building was finished, merely to obtain permission for other insurance at a second office, it was held not to avoid when not a material representation.⁵ It has been held that a back building is a part of a house;⁶ and that a cellar wall is covered by a policy on the building.⁷

607. In *Medina v. Builders' Mut. F. Ins. Co.*,⁸ a policy described the property as "contained in three-story granite building," and it was held that the phrase might intend a building with only a granite front, and three stories high in the front and rear, though only one story high in the middle, and if such was the fact, the property described in the policy contained in the building was covered. In *City of London F. Ins. Co. v. Smith*,⁹ it appeared that there was no rate for buildings of boards, and the agent fixed it at "brick" rates. The agent was required to designate to the company on a diagram "black" for boards and "red" for bricks; and he designated "black," but wrote in the policy the word "burds," which the insurer thought meant "brick." The policy was issued on a brick building, and it was held that it was not the insured's misrepresentation, and as there was no fraud and as the diagram showed the building was of wood, the insurer was held. A risk described as a stone building is not avoided by a kitchen of wood one story high,

¹ *Benedict v. Ocean Ins. Co.*, 31 N. Y. 389.

² *Wilkins v. Germania F. Ins. Co.*, 57 Iowa, 529.

³ *Barsalou v. Royal Ins. Co.*, 5 L. Can. R. 3.

⁴ *Perry Co. Ins. Co. v. Stewart*, 19 Pa. St. 45.

⁵ *Williams v. New Eng. Mut. F. Ins. Co.*, 31 Me. 219.

⁶ *Workman v. Ins. Co.*, 2 La. 507.

⁷ *Krvin v. N. Y. Cent. Ins. Co.*, 3 T. & C. (N. Y.) 213.

⁸ 120 Mass. 225.

⁹ 14 Ont. Ap. 328, 15 Duv. (Can.) 69.

which nothing showed to be permanent.¹ To a question, "are the outside walls brick or stone?" (note, "If the building be wood omit replies to these questions"), the insured answered "brick," and a plea that the house was not "brick" was held bad, as it should have averred that it was not "brick or stone."²

Where the policy was on brick dwellings which formed a part of a block of buildings, having the basement and first floor of brick, eight inches thick, but the upper stories built with joists filled in with brick four inches in thickness and plastered, evidence was admissible to show that such buildings were not such as were usually called brick houses.³ Where the insured stated that no material fact was omitted, and that on a block of five buildings insured were "first-class buildings, although one roof covers all, there is a solid wall of brick between each store or building," and there was no wall, it was held this (being found by the jury material) was a good defence if true.⁴ On a description of a brick building with a "composition roof, occupied by several tenants, and connected by doors with the adjoining building, situate at the corner of Charles Street and Western Avenue," it was held the latter words "situate," etc., referred to the building insured, and not to the adjoining building.⁵ A risk described as a two-story frame house filled in with brick, is avoided if not so filled in.⁶ Where a false material statement was to avoid, the description of the buildings as built of brick, roofed with slate, when one building was roofed with tar and felt, was held not material.⁷ Where the description was a "hard-finished frame building," which in fact was not finished with lath and plaster, as the phrase "hard-finished" implied, but in part with muslin covered with paper, it was held an avoidance.⁸ In *Meyer v. Queen Ins. Co.*,⁹ the description in a policy on "buildings" of a "brick-shingled sugar house and purgeries," was held not to mean that the "purgeries" were brick, where the diagram showed the

¹ *Chase v. Hamilton Mut. Ins. Co.*, 22 Barb. (N. Y.) 527.

² *Cox v. Ætina Ins. Co.*, 29 Ind. 586.

³ *Mead v. Northw. Ins. Co.*, 7 N. Y. 530.

⁴ *Sowden v. Standard Ins. Co.*, 44 U. C. Q. B. 95, 5 Ont. Ap. 290.

⁵ *Heath v. Franklin Ins. Co.*, 1 Cush. (Mass.) 257.

⁶ *Fowler v. Ætina Ins. Co.*, 6 Cow. (N. Y.) 673.

⁷ *Universal Non-Tariff F. Ins. Co.*, 19 Eq. Cas. 485.

⁸ *Jackson v. St. Paul F. & M. Ins. Co.*, 33 Hun. (N. Y.) 60.

⁹ 41 La. An. 1000.

"purgeries" to be mere wings of a main building, and the evidence showed that the "purgeries" were not usually considered part of the main buildings, and were usually more lightly constructed. In Canada a policy on a wooden house "*à être lambrissée en brique*," was held a mere expression of intention.¹ When the insurer consents to continue a risk on condition that an iron door shall be inserted, the insured may have a reasonable time therefor.²

608. In speaking of the age of a building the structure, and not the materials of which it is composed, is meant.³ In stating incorrectly the date at which a house was built, when there is a condition for the disclosure of material facts, it was held that a mistake of eight years was not material if the house were just as safe and good.⁴ The statement of the date at which a house was built does not imply that the house was then built entirely of new materials,⁵ and evidence to show such a usage among insurance people is inadmissible.⁶ A policy on an unfinished house does not cover wood-work prepared for the house and deposited in another adjoining.⁷

609. When, on a proposed insurance on chattels in a building, or on the building itself, the insurer requires as a condition to the policy that the uses to which the building is devoted shall be accurately stated or warranted, the insured cannot thereafter recover on the policy if an inaccurate description has been given or the warranty has been broken. But to this general rule there is the implied condition that the insurer is supposed to be acquainted with the usual demands and necessities ordinarily attendant upon the use or dedication described. And that by issuing a policy with the express information of the general use to which the building is to be put, and with the implied knowledge of the specific incidents of that use, the insurer will be taken to have impliedly permitted, or waived the right to object to them, unless he expressly prohibits them, though otherwise their presence might literally constitute a breach of one of the conditions of the contract.⁸

¹ North. Assur. Co. v. Prevost, 4 L. N. (Can.) 254.

⁵ Lamb v. Council Bluffs Ins. Co., 70 Iowa, 238.

² Viele v. Germania Ins. Co., 26 Iowa, 9.

⁶ Ib.

³ Phoenix Ins. Co. v. Pickel, 3 Ind. Ap. 332.

⁷ Ellmaker v. Franklin F. Ins. Co., 5 Pa. St. 183.

⁴ Eddy v. Hawkeye Ins. Co., 70 Iowa, 472.

⁸ See Viele v. Germania Ins. Co., 26 Iowa, 9; Mayor v. Hamilton F. Ins. Co., 10 Bos. (N. Y.) 537; Bryant v.

610. A building described as "occupied as a dwelling," is a warranty that it is a dwelling certainly at the issue of the policy.¹ A building "occupied as a dwelling" may have the rear occupied as a stable.² One may be said to occupy a dwelling though others live with him, as a son-in-law with his family.³ And it has been held, where the occupancy is by an owner or by a tenant, that a sub-tenant need not be disclosed.⁴ Where one described the risk as his "household furniture" he need not state, unless asked, that the same is in the custody of a lessee in a house not owned by him.⁵ A description of chattels, as contained in the insured's dwelling-house, where the insured occupied only one room of a house as a lodger, was held good under the stipulation to describe houses, buildings, or other places where the goods are.⁶ A description that the "first story is occupied by applicant as a brewery," and the second story "as a lodging-house and family residence," and also that the second story was occupied by a tenant, was held to afford no presumption that the applicant personally resided on the premises.⁷ A house may be said to be occupied by a family when people live in it under one management, though they do not take their meals there.⁸ The description of "a residence," has been held to include a temporary residence of three months.⁹ Statements by the insured to the agent at the issue of the policy as to the kind of occupancy of a house have been held relevant in explaining, though not in contradicting, the instrument.¹⁰ Where the building insured was marked as "Dwelling E," and the agent was shown to have known that it was also used for a tavern, it was held the letter E meant

Poughkeepsie Mut. Ins. Co., 17 N. Y. 200; *Mayor v. Exchange F. Ins. Co.*, 3

Keyes (N. Y.), 436; *Hall v. Ins. Co. of N. A.*, 58 N. Y. 292; *Brown v. Kings*

Co. F. Ins. Co., 31 How. Pr. (N. Y.) 508; *Wash. Mut. Ins. Co. v. Merch. & Mfrs. Mut. Ins. Co.*, 5 Oh. St. 450;

Girard F. & M. Ins. Co. v. Stephenson, 37 Pa. St. 293; *St. 450*; *People's Ins. Co. v. Spencer*, 53 Ib. 353.

¹ *Farmers & Drovers' Ins. Co. v. Curry*, 13 Bush (Ky.), 312; *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568.

² *Hannans v. Williamsburgh City F. Ins. Co.*, 81 Mich. 556.

³ *Chatillon v. Can. Mut. F. Ins. Co.*, 27 U. C. C. P. 450.

⁴ *Lyon v. Commer. Ins. Co.*, 2 Rob. (La.) 266.

⁵ *Little v. Phoenix Ins. Co.*, 123 Mass. 380.

⁶ *Friedlander v. London Assur. Co.*, 1 M. & Rob. 171.

⁷ *Menk v. Home Ins. Co.*, 76 Cal. 50.

⁸ *Poor v. Hudson Ins. Co.*, 2 Fed. R. 432 (D. N. H.).

⁹ *Grogan v. Lond. & Manchester Industrial Assur. Co.*, 53 L. T. R. N. S. 761.

¹⁰ *Poor v. Hudson Co.*, *supra*.

"et cetera" or "&c.," and that the company was bound.¹ The words in a policy on a building, describing it as a "house occupied as a dwelling," have been held to apply to such use at the issue of the policy only, and not to its future use or occupation at the loss.² So the description of a house "occupied by a tenant for dwelling and store" with a stipulation that a change of tenants or occupancy should avoid, has been held not to be a promissory warranty.³ And where a policy was issued on a building "occupied by assured as a dwelling-house," and six Italians subsequently boarded in the basement, it was held that the insurer was bound, as the words were merely descriptive.⁴ And in Alabama, *semble* even that such a phrase as "a two-story frame dwelling-house, when completed to be occupied as a private dwelling-house," is not a promissory warranty.⁵

611. Where a policy was issued on a building described as a dwelling and boarding-house, which in fact was a country tavern, containing a billiard-room, and dwelling-houses and taverns were classed as extra hazardous, and billiard-rooms as spécialement hazardous, it was held that the insured could not recover.⁶ But a finding by a jury, that "occupied as a boarding-house" covered a country inn which contained a private bar and billiard-room, was not disturbed, as the Court thought "boarding-house," "hotel," "inn," and "tavern," were all somewhat synonymous terms.⁷ A building described as "occupied as a hotel with bar and billiard-room attached," does not permit an occupation as a saloon at the issue of the policy.⁸ A policy upon a hotel, warranted as occupied as such by a tenant, which at the time of obtaining the insurance, is leased and apparently used as a hotel, has been held not to be avoided by

¹ *Gouinlock v. Mfrs. & Merch. Mut. Ins. Co.*, 43 U. C. Q. B. 563.

² *Hart. F. Ins. Co. v. Smith*, 3 Colo. 422; *Imperial F. Ins. Co. v. Kiernan*, 15 Ins. L. J. 352 (Ky.); *Blood v. Howard F. Ins. Co.*, 12 Cush. (Mass.) 472; *O'Neil v. Buffalo F. Ins. Co.* 3 N. Y. 122; *Browning v. Home Ins. Co.*, 71 N. Y. 508; *Cumberland Val. Mut. Protec. Co. v. Douglas*, 58 Pa. St. 419.

³ *Heffron v. Kittanning Ins. Co.*, 132 Pa. St. 580.

⁴ *Somerset Co. F. Ins. Co. v. Usaw*, 112 Pa. St. 80.

⁵ *Royal Ins. Co. v. Lubelsky*, 86 Ala. 530.

⁶ *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568.

⁷ *Martin v. State Ins. Co.*, 44 N. J. L. 485.

⁸ *Baker v. German F. Ins. Co.*, 124 Ind. 490.

its then use by the tenant as a bawdy-house without the knowledge or consent of the assured.¹ It has been decided that a policy on a hotel does not imply that it will be always so occupied.² And a house "occupied as a dwelling, hereafter to be occupied as a tavern and privileged as such," has been held not to imply that it will be occupied as a tavern.³

612. The description in the policy as "occupied for mercantile purposes" or for a store, is a warranty, and it is not necessary to insert the words, "and not for any other purposes."⁴ And permission to use the premises for "any mercantile purpose," does not include a restaurant.⁵ Though this is sometimes done, as in *Lawless v. Tenn. M. & F. Ins. Co.*,⁶ where the description was, "to be occupied as three stores, but not to be used for coffee houses," which was held a warranty, and not a negative description. A warranty that the insured occupied or kept the store is broken if his position is only that of clerk.⁷ Where the insured described a stock in trade as being in a store, which in fact was contained in a room of a lodging and boarding-house, alleged by the plaintiffs to be a hotel, and taverns were made by the terms of the policy extra hazardous risks, it was held that the insurance was forfeited; the difference in the small village where the *locus* was, between a tavern and a hotel being practically immaterial, though apparently had the tavern not been a hotel the same result would have been reached.⁸ In Michigan, the presence of a bakery and restaurant in a building has been held not to violate a description of residence and stores.⁹ But this is certainly a very liberal construction. The description of a building as "occupied for stores below; the upper portion to remain unoccupied during the continuance of the policy," was held only promissory as to the latter part.¹⁰ In Illinois, where a question was asked concerning the number of tenants of the building in a policy

¹ *Hall v. People's Mut. F. Ins. Co.*,

⁶ *Angel on Ins.*, § 169.

6 *Gray (Mass.)*, 185.

⁷ *Mullin v. Vt. Mut. F. Ins. Co.*, 54

⁸ *Merch. Ins. Co. v. Frick*, 2 *Amer. L. Rec.* 336 (Oh.).

Vt. 223.

⁹ *Prudhomme v. Salamander F. Ins.*

³ *Catlin v. Springfield F. Ins. Co.*, 1 *Sum.* 434 (D. Mass.).

Co., 27 *La. An.* 695.

⁹ *Richards v. Wash. F. & M. Ins.*

⁴ *Tex. Banking & Ins. Co. v. Stone*, 49 *Tex.* 4.

Co., 27 *N. W. R.* 586 (Mich.).

¹⁰ *Stout v. City Ins. Co.*, 12 *Iowa*,

⁵ *Garretson v. Merch. & Bankers' Ins. Co.*, 81 *Iowa*, 727.

on goods, it was held not reasonable to suppose that an incorrect answer as to the number of tenants in other parts of the buildings would avoid the insurance.¹

613. In a policy on barns "used for hay, straw, grain unthreshed, stabling and shelter," the use of oil, lime, paints, etc., and mixing them as is usual among farmers for painting the house, will not avoid the policy, the words not being held a warranty, but mere description.² But a policy on a "dwelling-house and wood-house," "occupied for the usual purposes," was held to cover a building built with a single frame and roof, designed for a carriage and wood, the wood filling about two-thirds of it and separated by a loose partition from the carriage-house, and parol evidence was admitted to show that it was known as the wood-house.³

614. The warranty that a cotton and woollen-mill is of one class, when it belongs to another class at the time, avoids the policy; and Lord Eldon in this case observed whether the risk is equally great in one class as in another has nothing to do with the question, the only question being, what has the insurer insured.⁴ A description in an application for insurance that a building is used "for the manufacture of lead pipe," or "of lead pipe only," would not include the manufacture of wooden reels, on which the lead pipe is coiled, unless essential to the reasonable and proper carrying on of the business of manufacturing lead pipe.⁵ Where the description of the business carried on by plaintiffs in a specified building is the manufacture of bath-tubs, and they carried on upon adjoining premises the business of sawing and planing lumber, the shavings being carried therefrom by a tube to the boiler room of the building referred to and used for fuel, it was held that no breach of warranty was shown, for the sawing or planing trade was not conducted on the premises described as used for bath-tubs.⁶ The description in a policy on a "saw-mill building," which was near a factory building, and "all kinds of machinery," etc., there being taken also some insurance on "lumber in process," with a clause against change of

¹ Howard F. & M. Ins. Co. v. Cor-mick, 24 Ill. 455.

² Billings v. Tolland Co. Mut. F. Ins. Co., 20 Conn. 139.

³ White v. Mut. F. Assur. Co., 8 Gray (Mass.), 566.

⁴ Newcastle F. Ins. Co. v. McMorran, 3 Dow. 255.

⁵ Collins v. Charlestown Mut. F. Ins. Co., 10 Gray (Mass.), 155.

⁶ Keeney v. Home Ins. Co., 71 N. Y. 396.

use, was held not to be an agreement that the saw-mill was only to be used to saw logs into lumber, but that it might also be used as a box factory, as the description of the "saw-mill building" was to distinguish it from the factory building, rather than to warrant a limited use, the building at the time being employed in both ways, within the knowledge of the insurer's agent.¹ But a policy on a rope-maker's stock "contained in a brick building," etc., "occupied as a storehouse, and about 42 feet distant from rope-walk," was held avoided when partially used for hackling hemp and spinning it into rope yarn.² A factory for distilling paraffine oil has been held not to be a distillery.³ And the description of the use as a grist-mill is violated by the presence of a place for carpenter's work.⁴

615. In *Shaw v. Robberds*,⁵ the policy provided "unless the buildings insured, or containing the goods insured, be accurately described, the trades carried on therein specified, and the nature of the property correctly stated, so that it may be placed under proper classes," etc., "and if a building contain any stove or oven (used in the process of manufacture), kiln, furnace, or steam-engine, or any process of fire heat be carried on therein, other than the ordinary risk of common fires in private houses, the same must be noticed in the policy," or the insurance must be avoided; and it was held that only an accurate description at the issue of the policy was intended, and that there was not a continuing warranty. And where a policy was issued on buildings, situate at A.: "first floor occupied by machinery used for making barrels, with privilege of storing barrels on the premises and other merchandise not more hazardous; steam-boiler incased in brick about ten feet from building," it was held only to refer to the facts existing at the issue of the policy, and that the introduction of new machinery, such as saws, lathes, to a small extent for making boxes, but disused sometime before the fire, though this last business was to have been resumed, did not avoid the policy.⁶ A warranty in a policy on a house of two stories, that it was used for winding and coloring yarn,

¹ *Frost's Detroit, Etc., Works v. Miller's & Mfrs. Mut. Ins. Co.*, 37 Minn. 300.

² *Wall v. East River Mut. Ins. Co.*, 7 N. Y. 370.

³ *Atlantic Dock Co. v. Libby*, 45 N. Y. 499.

⁴ *Jennings v. Cheungo Co. Mut. Ins. Co.*, 2 Den. (N. Y.) 75.

⁵ 6 Ad. & E. 75.

⁶ *U. S. F. & M. Ins. Co. v. Kimberly*, 34 Md. 224.

was considered not to warrant that it would continue so.¹ It is to be observed, however, that in the last two, and in many of the other cases on this point, there were besides in the policies clauses of forfeiture for an increase of risk, which was considered by the Judges to further show that the parties did not intend the description to be continuing warranties. In *Wood v. Hart. F. Ins. Co.*,² the policy was on a paper-mill, together with the machinery, wheels, gearing, etc., and in a memorandum annexed, paper-mills and grist-mills were specified to be at special rates. At the issue of the policy the building was used only as a paper-mill, but later this use was discontinued, the rag-cutter and duster being removed, and a pair of millstones for grain put up, which were moved by the same power and machinery. The risk was greater than on a non-user, but not greater than the old use of the paper-mill had been. It was held, on a loss not caused by the use of the millstones, that there was a continuing warranty that the subject must be a paper-mill; but that its use had not been changed by the introduction of the millstones, as it was still a paper-mill ready for use, that the memorandum articles not being contracted about in the policy would not be covered, but that their introduction would not necessarily vitiate the insurance.³

616. In *Shaw v. Robberds*⁴ the principle was asserted, where the policy was on a building dedicated to a specified use, and prohibited a changed use, that a permanent change and not a casual temporary change was meant. There, the policy was issued on premises insured as a "granary" and a "kiln for drying corn in use," and prescribed a forfeiture unless the building and the trades carried on were accurately described, or if there should be any alteration in the building and change of business, etc. The regular business was drying corn, but the place was loaned gratuitously on one occasion to dry bark, when the premises were destroyed, though the fire lighted for the purpose was not made in an unusual way to dry the bark; and it was held not to be a forfeiture, though drying bark was a distinct trade and commanded a higher premium, because the clause was directed against a permanent alteration or change.

617. But a proviso for forfeiture if the mill "shall cease to be

¹ *Smith v. Mechan. & Traders F. Ins. Co.*, 32 N. Y. 399.

² 13 Conn. 533.

³ See *Elstner v. Cincinnati Equit. Ins. Co.*, 1 Dis. (Oh.) 412.

⁴ 6 Ad. & K. 75.

operated" without notice, has been held not to apply to a temporary cessation caused by an epidemic.¹ Or by a temporary suspension for want of necessary supplies.² A policy was issued on a mill occupied as a saw-mill; the insured had their servants in charge of the mill, which was usually worked about four months a year, though since its purchase by the insured, owing to low water and freshets, it could not be worked as long. Held, as its intended use was accurately described, that the policy was not void for the suspension of use, if it was used as much as the seasons of the year would permit.³ A clause for suspension of the insurance if the mill should be "shut down" or "remain idle from any cause whatsoever" for twenty days without notice, applies even when the idleness occurs by reason of necessary repairs.⁴

618. "Constantly" worked means that the mill is worked during usual and ordinary working days and hours for business for which it is employed.⁵ The applicant's statements, that he ran "the cards," etc., day and night, the rest only twelve hours; "only intend running at nights until we get more cards," "we shall run only four months at night," were held to be a warranty that the night work would not be run longer than the time indicated.⁶ And where the policy forbade running at night, but contained a written permit to run at night during four months for an extra rate, the two clauses were held consistent.⁷ The answer was "worked usually" — hours "in the winter," "short time now in summer," does not necessarily exclude a night running occasionally in summer.⁸ Where night running is expressly forbidden, a custom to show that other manufacturers are in the habit of doing it is bad.⁹ A policy on a mill including the standing and going gear therein, engine house adjoining and steam-engine therein, recited that the builnings were brick built, etc., warmed exclusively by steam, etc., worked by the steam-

¹ *Poss v. West. Assur. Co.*, 7 Lea (Tenn.), 704.

² *Lebanon Mut. Ins. Co. v. Leathers*, 20 W. N. C. (Pa.) 107.

³ *McGibbon v. Imperial F. Ins. Co.*, 2 R. & G. (N. S.) 6.

⁴ *Day v. Mill Owners' Mut. F. Ins. Co.*, 70 Iowa, 710.

⁵ *Prieger v. Exchange Mut. Ins. Co.*, 6 Wis. 89.

⁶ *Bilbrough v. Metropolis Ins. Co.*, 5 Duer (N. Y.), 587.

⁷ *Reardon v. Faneuil Hall Ins. Co.*, 135 Mass. 121.

⁸ *North Berwick v. New Eng. F. & M. Ins. Co.*, 52 Me. 336.

⁹ *Reardon v. Faneuil Hall Ins. Co.*, 135 Mass. 121.

engine mentioned above, in the tenure of the firm only, standing apart from all other mills, and "worked by day only," and it was held that the phrase "worked by day" applied to the mill only, and not to the engine or gearing; for the buildings could not all be worked by the steam-engine, and therefore it must mean all those capable of being worked by the steam-engine; and then the phrase would read, all capable of being worked by the steam-engine and worked by day.¹ In an action on another policy, upon the machinery of cotton mills, containing a warranty that the mills should be worked by day only, a plea averring that a steam engine and horizontal shafts being parts of the mills, were worked at night and not by day only, without the insurer's consent, was held bad; for it should have averred that all or substantially all the mills were so worked.² A prohibition of a policy against running over or extra hours is meaningless in the absence of any standard in the policy for determining what were to be regarded as extra hours.³ A clause forfeiting a policy if the premises insured should cease to be operated, it has been held, would not apply to an insurance on boots and shoes manufactured and being made on the premises; where there was a separate policy on the factory and another on the machinery and supplies, both of which were held forfeited.⁴

619. The answer: "There is a man on the premises," to the question, "Is it (the mill) in charge of some faithful person, residing on the premises when idle?" was held a continuing warranty, which prevented a recovery when the premises were unoccupied while idle.⁵ And the answer that "there is no watchman, but two hands sleep in the mill," where the truth of an answer was made a warranty, was held a warranty of a fact, and was a promissory warranty; and a subsequent warranty to use only whale oil, did not defeat the effect of the former warranty.⁶ The *dicta* to the contrary in *May v. Buckeye Mut. Ins. Co.*,⁷ are predicated of the fact that the agent was expressly made aware of the practice to run the factory only for a certain period, and therefore it was only

¹ *Whitehead v. Price*, 2 C. M. & R. 447.

² *Mayall v. Mitford*, 6 Ad. & E. 670.

³ *German Amer.-Ins. Co. v. Steiger*, 13 Ins. L. J. 546 (Ill.).

⁴ *Stone v. Howard Ins. Co.*, 153 Mass. 475.

⁵ *Miller v. Germania F. Ins. Co.*, 34 Leg. Int. (Pa.) 339. See also *City Ins. Co. v. Power*, 19 Pitts. L. J. 113.

⁶ *Blumer v. Phoenix Ins. Co.*, 45 Wis. 622.

⁷ 25 Wis. 291.

necessary that the answers to be correct during the actual time of the running, and they were only so meant to apply. In *Frisbie v. Fayette Mut. Ins. Co.*,¹ the words "clerk sleeps in store" were held merely descriptive as to the future. Whether the judgment of this case, which strikes the author as doubtful, is correct or not, the reasoning of the Judge, Lowry, who delivered the opinion, is certainly not convincing. In the Province of Ontario the statement "a watchman kept at night" was also held only to relate to the time of the issue of the policy.² In New York a "watch at nights" was held to mean every night.³ And a warranty of "watchman nights" means every night, including Sunday, though no work may be done on that day.⁴ And a custom among manufacturers to omit a Sunday watch is inadmissible.⁵ A policy on a "machine-shop," "a watchman kept on the premises," does not require a watchman to be kept there constantly, but only at such times as men of ordinary care and skill in a similar business keep a watchman on their premises; and in an action on such a policy, evidence of the usage in this respect of similar establishments is admissible.⁶ Where the presence of a watchman on the premises is a warranty, it has been held to be immaterial where he keeps himself; and if there, he may be even in an office which is uninsured.⁷ An agreement to employ watchmen on the premises while a mill should be idle was held not to be broken when he was on premises connected with the mill, at a short distance off, though not actually in the building at the time of the fire, but where he could see better.⁸ And if he be a capable and faithful watchman, the fact that he is employed by other people as well as the insured is not material.⁹ But the agreement to keep a watchman is probably not fulfilled by the presence of a man

¹ 27 Pa. St. 325; *Grubbs v. Va. F. & Co.*, 30 N. Y. 136. See *Sheldon v. M. Ins. Co.*, 110 N. C. 108. *Hartford F. Ins. Co.*, 22 Conn. 235.

² *Worswick v. Can. F. & M. Ins. Co.*, ⁵ *Ripley v. Ætna Ins. Co.*, 30 N. Y. 136.

³ *Ins. L. J.* 299 (Can.). See *Whitlaw v. Phoenix Ins. Co.*, 28 U. C. C. P. 53. ⁶ *Crocker v. Peoples' Mut. F. Ins. Co.*, 8 Cush. (Mass.) 79.

See also *Va. F. & M. Ins. Co. v. Buck*, ⁷ *Andes Ins. Co. v. Shipman*, 77 Ill. 13 S. E. 973 (Va.).

⁸ *Ripley v. Ætna Ins. Co.*, 30 N. Y. 189. ⁹ *Sierra Milling, Etc., Co. v. Hart. F. Ins. Co.*, 76 Cal. 235.

⁴ *Glendale Woollen Co. v. Prot. Ins. Co.*, 21 Conn. 19; *Ripley v. Ætna Ins. Co.*, ⁹ *Hovey v. Amer. Mut. Ins. Co.*, 2 Duer (N. Y.), 554.

who merely sleeps on the premises.¹ The requirement that when the mill is idle a watchman should "be in and about the premises day and night," is broken if the watchman does not watch at night, and sleeps about three hundred feet off in a distant building.²

620. In *Houghton v. Mfrs. Mut. F. Ins. Co.*,³ the questions and answers were: "Q. Is a watch kept constantly in the building? Q. If no watch is constantly kept, state what is the arrangement respecting it? A. No watch is kept in or about the building, but the mill is examined thirty minutes after work. (This last part of the answer being meant to refer to a requirement of the policy that 'an examination will be had, say, thirty minutes after work.') Q. During what hours is the factory worked? A. From 5 o'clock A. M. to 8.30 P. M. Sometimes extra work will be done in the night." It was held that the contract plainly showed that an examination was to be a substitute for a constant watch, and meant a general practice of examination, and not that of a fact existing only at the issue of the policy; the statements were, however, to be treated as representations, and a substantial compliance was therefore only demanded. What is a cessation of work at a factory, from which the thirty minutes were to be computed, would be a question for the jury under all the circumstances of the particular case.⁴

621. Where there was a warranty of a watchman, but on the day previous to the destruction of the property the personal property in the mill was levied upon by the sheriff, who excluded the employes from the mill, took the keys, locked up the building, and left his deputy and one of the trustees of the insured at the office of the mill, about two rods from it, during the night up to the time of the discovery of the fire, which occurred about 4 A. M., but not in order to, nor did they, keep watch, it was held a breach.⁵ The jury are to pass upon the evidence relating to the fact whether the stipulation as to a watch has been complied with.⁶

¹ *Wenzel v. Commer. Ins. Co.*, 67 Cal. 438; *Brooks v. Standard F. Ins. Co.*, 11 Mo. Ap. 349.

² *Rankin v. Amazon Ins. Co.*, 89 Cal. 203.

³ *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill. 553. See *Houghton v. Mfrs. Mut. F. Ins. Co.*, 8 Met. (Mass.) 114.

⁴ *Houghton v. Mfrs. Mut. F. Ins. Co.*, *supra*.

⁵ *First Nat. Bk. v. Ins. Co. of N. A.*, 50 N. Y. 45.

⁶ *Percival v. Me. Mut. Ins. Co.*, 33 Me. 242; *Parker v. Bridgeport Ins. Co.*, 10 Gray (Mass.), 302; *Gibson v. Farmers' & Mechan. Ins. Co.*, 1 C. S. C. R.

622. False representations as to the existence of a brick chimney avoid.¹ But where there was a warranty to keep chimneys well secured, etc., and the insurer's agent made a survey and knew their state, the warranty was held to mean to keep in as good a state of repair as that in which the agent saw them.² The agreement by the insured to give a full, just, and true exposition of all the facts and circumstances in regard to the condition and situation of a carpenter's shop was held not broken by an innocent omission to state that the shop was heated by stoves.³ But where the number of stoves is wrongly stated by the insured it avoids.⁴ To the question whether the stoves, funnels, flues, etc., employed for heating, or used, were properly secured, an answer "none" means there were none used for that purpose; not that there were none in the place used or unused.⁵

623. A proviso that there shall be no liability for injury by fire unless the building is provided with good brick or stone chimneys, does not imply that the stove should be built into or form a part of the chimney.⁶ The statement that the stove-pipes entered brick chimneys was held to be fulfilled if entering an equally safe material as grout, tile, or stone, as the Court considered a substantial compliance was all that was intended by the parties.⁷ A stipulation, in an application for a steam manufactory, that where steam was used it must be notified to the head office and approved, was held not to refer to a vacant distillery, the active operation of which was not contemplated at the issue of the policy.⁸ A representation in an application, which was made part of the policy, that a counting-room in the building which contained the property insured is warmed by a stove, and that the stove and funnel are well secured, does not bind the insured to keep the stove and funnel well secured when not in use.⁹ The insured was treated in an extremely

(Oh.) 410; *Power v. City F. Ins. Co.*, 8 Phila. 566, 19 Pitts. L. J. 113 (Pa.). ⁵ *Lyon v. Stadacona Ins. Co.*, 44 U. C. Q. B. 472.

¹ *Mulvey v. Gore Dist. Mut. F. Assur. Co.*, 25 U. C. Q. B. 424. ⁶ *Madsden v. Phoenix F. Ins. Co.*, 1 S. C. N. s. 24.

² *Simmons v. Ins. Co.*, 8 W. Va. 474. ⁷ *Bankhead v. Des Moines Ins. Co.*, 30 N. W. R. 740 (Iowa).

³ *Girard F. & M. Ins. Co. v. Stephenson*, 37 Pa. St. 293. ⁸ *Rowe v. Lond. & Lancash. F. Ins. Co.*, 12 U. C. Ch. 311.

⁴ *O'Neill v. Ottawa Agricultural Ins. Co.*, 15 Can. L. J. 207. ⁹ *Loud v. Citizens' Mut. Ins. Co.*, 2 Gray (Mass.), 221.

liberal way in *Mickey v. Burlington Co.*¹ There was an agreement in a policy to keep stoves and pipes in proper condition. The wife of the insured took down the pipe in the second floor, as was her custom, for the summer, but left the pipe in the first floor connected with the stove. She placed a bed over the aperture, and, forgetting this, lighted the stove below, and it was held the taking down the pipe for summer was proper, and was not a breach of the condition.

624. A policy is not avoided by the use of the building in which insured articles are stored for a single night as a shelter for the crew of a wrecked vessel, though loss is occasioned by the crew's making a fire in a stove which was in an unfit condition at the time, contrary to the express directions of the insured, though there was a warranty that the stove was well secured, etc. For it was said the insured is not liable for the acts of trespassers, and the warranty only applied to the stove when it is intended for ordinary use.² On a policy on an unfinished building a warranty against a stove has been considered to prohibit its habitual presence, as is usual in a completed dwelling, but not to apply to its casual use in completing the house.³

625. In an application for insurance on a school house the insured stated that the ashes were taken up in metallic vessels, which were not allowed to stand on wood with ashes in them; that the ashes, if deposited in or near the building, were in brick or stone vaults, and the application concluded with a memorandum that "if ashes are allowed to remain in wood, the insurers will not assume the risk," and was made part of the contract of insurance. There were no vaults of brick or stone, and the ashes were generally deposited on the ground at a short distance from the building; but the boy employed to take charge of the building for two or three weeks before the fire, without orders, placed the ashes in a wooden barrel in a shed adjoining the school-house, and the insurers were held discharged.⁴ Where, as in a Massachusetts case, the stipulation of the application is held a representation, only a substantial compliance is necessary, so that such a stipulation as that ashes should be kept in brick is complied with if kept in an equally safe place.⁵ In Canada a clause against keep-

¹ 35 Iowa, 174.

⁴ *City of Worcester v. Worcester*

² *Loud v. Cit. Mut. Ins. Co.*, 2 Gray Mut. F. Ins. Co., 9 Gray (Mass.), 27. (Mass.), 221.

⁵ *Underhill v. Agawam Mut. F. Ins.*

³ *Williams v. N. E. Mut. F. Ins. Co.*, Co., 6 Cush. (Mass.) 440. 31 Me. 219.

ing ashes in wooden vessels near a house was held not invalidated by the keeping of cold ashes.¹ Where the defendants in a suit on a policy show that, contrary to a condition, ashes had been deposited in wooden vessels after the issue of the policy, which the plaintiffs rebut by evidence that for some years prior and down to the present time ashes had not been deposited, evidence on the part of the defendants that before the issue of the policy ashes were usually so deposited is inadmissible.² In Illinois it has been held that the statement of the insured, "no stoves used," in answer to the insurer's questions, is not a continuing warranty.³ And also the written statement in the application, "no fire in or about said building, except under kettle securely embedded in masonry (used for heating water) and made secure against accidents," was held only to imply a description at the issue of the policy.⁴

In *Murdock v. Chenango Co. Mut. Ins. Co.*,⁵ a statement in the contract that "there is one stove in the building insured, pipe passes through the window at the side of the building; there will, however, be a stone chimney built and the pipe will pass into it at the side," was held a warranty that the chimney should be built within a reasonable time; which would be for the jury.⁶ This case was distinguished from *Alston v. Mechan. Mut. Ins. Co.*,⁷ where the statement was a verbal representation, and therefore not part of the written contract.

626. An agreement by the insured to keep twelve pails of water on each flat of the building if not performed as to number avoids.⁸ Where, to an inquiry in an application for insurance upon a manufactory, "Are there casks in each loft constantly supplied with water?" the answer was "There are in each room casks kept full constantly," it was held that evidence on the part of the insured was admissible to show that among manufacturers the whole of a loft or story appropriated to a particular department is called "one room," although the same might be divided by partitions with doors.⁹ And

¹ *Com. d'Assur. Mut. v. Carbonneau*,

⁵ 2 N. Y. 210.

16 Rev. Leg. (Can.) 275.

⁶ *Lindsey v. Un. Mut. F. Ins. Co.*, 3

² *Underhill v. Agawam F. Ins. Co.*,

R. I. 157.

6 Cush. (Mass.) 440.

⁷ 4 Hill, 329. See *ante*, § 534.

³ *Aurora F. Ins. Co. v. Eldey*, 55 Ill. 213.

⁸ *Garrett v. Provincial Ins. Co.*, 20 U. C. Q. B. 200.

⁴ *Schmidt v. Peoria M. & F. Ins. Co.*, 41 Ill. 295.

⁹ *Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 416.

that the meaning of the word "room," and whether there was any such general use of language, were questions for the jury and not for the Court.¹ And if such use of the word "room" was general among manufacturers, it was not necessary to be expressly known and general among insurers in order to effect a contract of insurance upon manufacturing property; for the insurers must be presumed to have so understood it when they insured such property.² Therefore, when the defence to an action on the policy in such a case was that water casks were not kept in each room of the building according to the representation of the insured, but only in each story, it was held that an expert may be asked by the plaintiff whether the existence of the partition in a story increased the risk, or created a necessity for another cask, if there were openings in it sufficient to readily roll a cask of water.³

It has been held by Clifford, J., in the Federal Court for Rhode Island, that substantial compliance was only requisite in a promissory warranty; consequently that a sufficient supply of water casks and buckets is kept in each room was held sufficiently complied with by keeping them in a place easily accessible to each room.⁴ The agreement to keep "buckets filled with water" means where the atmosphere renders it possible; and if the water in the buckets is in a solid form or frozen, it is a compliance; though the buckets must be shown to be ready for use.⁵ The warranty, in a policy on buildings in the course of construction, of "water tanks to be well supplied with water at all times" was held complied with, if the tanks at the commencement of the risk are reasonably advanced towards completion compared with the then state of the buildings, and their construction is afterwards continued with reasonable dispatch until the time of the fire.⁶ The compliance with a warranty to keep a water supply on top of a building ready for immediate use is one of fact for the jury.⁷ A warranty of a force-pump ready at all times for use implies that there is some power to work it, but not any special

¹ *Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 416.

² *Ib.*

³ *Ib.*

⁴ *Cady v. Imperial Ins. Co.*, 4 Clif. 203 (D. R. I.).

⁵ *Aurora F. Ins. Co. v. Eddy*, 55 Ill. 213.

⁶ 5 Gray (Mass.), 497. But see *Howell v. Hart. F. Ins. Co.*, 3 Ins. L. J. 649 (N. D. Ill.).

⁷ *Sierra Milling, Etc., Co. v. Hart F. Ins. Co.*, 76 Cal. 235.

kind.¹ But there is not a warranty that the fire itself shall not destroy it.² And an agreement to keep a force-pump does not imply the presence of a hose, as the water may be conveyed through other media, as buckets.³ The answer of "force-pump with abundance of water" to the question of "what are the facilities for extinguishing fire?" was held not to be a continuing warranty.⁴ Where it was stated that "the picker is inside of the building, but no lamps used in the picking-room," the use of lamps in the picker-room rendered the policy void.⁵

627. Furniture in a house means in any part of it, and will cover what is stored in a garret.⁶ And a policy on the house, shed, kitchen apartment, and furniture of the household, linen, effects, etc., the property of the insured, was held to cover the furniture anywhere on the premises, in any of the buildings, the shed, or the separated but appurtenant kitchen, and not merely that in the house.⁷ Household furniture may include silver spoons.⁸ And a Japanese vase is included within "household furniture, useful and ornamental."⁹ A watch was held a memorandum article, and not covered by a policy on household furniture and wearing apparel.¹⁰ Silver forks or teaspoons or tablespoons do not come within the terms of memorandum articles—"money, bullion, plate, watches, jewels"—but may be included within the term furniture.¹¹

628. In *N. Y. Gaslight Co. v. Mechan. F. Ins. Co.*,¹² in 1825, a policy for \$2000 was taken for three years on "gas-meters" placed or to be placed in the city of New York, and in 1826 a policy for \$5000 was issued for seven years on "fixtures" placed or to be placed in the buildings of the subscribers of the gas company. At the date of the first policy the plaintiffs had put up \$2000 worth of meters, but at its expiration had increased them to \$20,000, and when the second policy was issued the value of the fixtures was

¹ *Sayles v. Northw. Ins. Co.*, 2 Curt. 510 (D. R. I.).

² *Ib.*

³ *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill. 553.

⁴ *Gilliat v. Pawtucket Mut. F. Ins. Co.*, 8 R. I. 282.

⁵ *Clark v. Mfrs. Ins. Co.*, 8 How. 235.

⁶ *Clarke v. Firemen's Ins. Co.*, 18 La. 431.

⁷ *Compagnie d'Assurance v. Villeneuve*, 4 Dor. (Quebec), 376.

⁸ *Moadinger v. Mechan. F. Ins. Co.*, 2

Hall (N. Y.), 490.

⁹ *Bowne v. Hart. F. Ins. Co.*, 46 Mo. Ap. 473.

¹⁰ *Clary v. Protec. Ins. Co.*, Wr. (Oh.)

227.

¹¹ *Hanover Ins. Co. v. Mannasson*, 29

Mich. 316.

¹² 2 Hall (N. Y.), 108.

\$5000, but that was also increased to \$100,000. It was held that parol evidence of the agent's verbal statements as to what value was to be intended to be covered was inadmissible, and the policies covered all "fixtures" erected before or after the date of the policies, and not merely those put up at the issue of the policies.

In *Stewart v. Factors' Mut. Ins. Co.*,¹ where, by a general course of dealing and custom at M., all consignments were insured by factors unless otherwise instructed, an open policy was issued on cotton, reciting "it is intended to cover upon all shipments of property belonging to" the factors of A., "or to others, unless otherwise instructed," on certain boats, etc.; "the said factors to enter on their open policy books and report" all shipments on the day of shipment, and the premiums were then paid. Certain cotton was burned which the factors, through a misunderstanding with A., thought they were not bound to insure; but the company had not been ordered otherwise; and it was held the insurer had agreed by his policy to cover all cotton the factors were bound to insure; that the question as to what was covered did not depend upon what the opinion of the factors was, nor whether the premiums had been paid or entries made as required, as this was only a mode of adjustment between the factors and the insurer, subject to corrections; but the test was whether the factors were bound to insure. In a marine policy on fur, with an average memorandum on skins, hides, and other perishable articles, evidence of a usage was held competent to show that fur included skins in the invoice, but that in the memorandum clause skins and hides, etc., were not included in the word "fur" by a general usage.² A policy on English, American, and West Indies goods will only include goods of such nationalities, and therefore teas and nutmegs, not being such, will not be included.³ A policy on "cattle" will include hogs.⁴ It has been held that a policy on "grain in stack and granary" will cover a stack of flax raised for the seed, and not for the fibre, the word flaxseed meaning grain as used by the parties.⁵ But it has been held that rice is not

¹ 14 Ins. L. J. 468 (Tenn.).

⁴ *Decatur Bk. v. St. Louis Bank*, 31

² *Astor v. Un. Ins. Co.*, 7 Cow. (N. Y.) 202.

Wal. 294.

⁵ *Hewitt v. Watertown F. Ins. Co.*,

³ *Huckins v. Peoples' Mut. F. Ins. Co.*, 31 N. H. 239.

55 Iowa, 323. See also *Holland v. State*, 34 Ga. 455; *State v. Williams*, 2 Strobb. (S. C.) 474.

"corn" within the memorandum clause.¹ A hurricane policy to a farmer on stock, crops, and farming implements was held to cover growing wheat.²

629. In America insurance on a brick store, excepting "fences and other yard fixtures, sidewalks, store furniture and fixtures," will cover a wooden awning supported by pillars, with rafters extending into a brick wall in front of the house.³ The words "store fixtures" are usually intended to apply to a shop or warehouse, but not a manufactory.⁴ The words "store fixtures," in the exception of the policy, mean store fittings or fixed furniture, which are adapted to make a room a store, rather than another thing of a different character, as a factory.⁵ An office in a store enclosed by a wire fence is a store "fixture."⁶ So are shelving,⁷ and counters and drawers placed by the lessor in a store.⁸ And evidence of a custom to show that the words "store fixtures" in a policy apply to furniture and shop articles necessary or convenient in trade was held admissible.⁹ In *Mooney v. Howard Ins. Co.*,¹⁰ a junk-dealer was insured "on his stock of rags, old metals, bones and barrels," which stock consisted of old articles, paper stock, and fragments of all kinds, and it was held that he might prove that the terms, by a general usage of the trade, included other articles than those specified, and that a jury might infer from such usage, if of long continuance, that the insurers knew of the technical meaning of the terms. A policy on stock, "such as is usual in a country store," covers all such articles as are usually kept, though such articles may be prohibited specially in the policy by another clause.¹¹ A policy on "jewels and clothing," being "stock in trade," does not cover guns or pistols, or books.¹² A policy on a stock of watches, watch trimmings, etc., and fixtures, contained in a store in Boston, covers

¹ *Scott v. Bourdillion*, 2 B. & P. (N. R.) 213.

² *Mut. F. Ins. Co. v. De Haven*, 18 W. N. C. (Pa.) 125.

³ *Conn. F. Ins. Co. v. Allen*, 80 Ala. 571.

⁴ *Thurston v. Un. Ins. Co.*, 17 Fed. R. 127 (D. N. H.).

⁵ *Ib.*

⁶ *Commer. F. Ins. Co. v. Allen*, 80 Ala. 571.

⁷ *Commer. F. Ins. Co. v. Allen*, 80 Ala. 571.

⁸ *Pope v. Garrard*, 39 Ga. 471.

⁹ *Whitmarsh v. Conway F. Ins. Co.*, 16 Gray (Mass.), 359.

¹⁰ 138 Mass. 375.

¹¹ *Pindar v. Kings Co. F. Ins. Co.*, 36 N. Y. 648; *Whitmarsh v. Conway F. Ins. Co.*, 16 Gray (Mass.), 359.

¹² *Rafel v. Nashville M. & F. Ins. Co.*, 7 La. An. 244.

not only watches, watch trimmings, parts of watches, watch materials, and watch tools, but also such silver and plated ware, clocks, jewelry, and other goods as usually form part of the stock in shops in Boston where watches and watch trimmings are sold.¹ But a policy of insurance upon a "stock of hair, wrought, raw, and in process, as retail hair store," does not extend to fancy goods made of other materials, although such are usually kept and sold in a retail hair store.² Nor are "paper bags," for holding flour, covered by a policy on "tools."³ Under a policy on a corn dealer's and seaman's "stock in trade, consisting of corn, seed, straw, fixtures, and utensils in business," the value of hops and matting cannot be recovered, though part of the usual stock in trade, as the words "stock in trade" are limited by the words following.⁴

630. An open policy on merchandise will only cover articles kept for sale; but a policy on property will cover those kept for sale as well as use.⁵ On a policy to one who was not a linen draper, but was a coach-plater and cow-keeper, the words "his stock in trade, household furniture, linen, wearing apparel, and plate," do not include linen drapery goods subsequently purchased on speculation; as the word linen here means household linen, since he did not deal in linen.⁶ And wearing apparel, household furniture, and the stock of a grocery will include linen sheets which are laid in for use or sale though not that what is not laid in for family use or for legitimate sale, but is smuggled in to the country and kept for clandestine sale.⁷

631. Where the policy is on a stock of goods which are for sale and from time to time replenished, those purchased after the issue of the policy will be covered.⁸ And the same rule has been held to apply to a policy on live stock.⁹

¹ *Crosby v. Franklin Ins. Co.*, 5 Gray (Mass.), 504.

² *Medina v. Builders' Mut. F. Ins. Co.*, 120 Mass. 225.

³ *Hutchinson v. Niagara Dist. Mut. F. Ins. Co.*, 39 U. C. Q. B. 483.

⁴ *Joel v. Harvey*, 5 W. R. 488.

⁵ *Burgess v. Alliance Ins. Co.*, 10 Allen (Mass.), 221.

⁶ *Watchorn v. Langford*, 3 Camp. 422.

⁷ *Clary v. Protec. Ins. Co., Wr. (Oh.)* 227.

⁸ *City F. Ins. Co. v. Mark*, 45 Ill. 482; *Peoria M. & F. Ins. Co. v. Anapow*,

51 Ill. 283; *Amer. Cent. Ins. Co. v. Rothchild*, 82 Ill. 166; *Lane v. Me. Mut. F. Ins. Co.*, 12 Me. 44; *Whitwell v. Putnam F. Ins. Co.*, 6 Lans. (N. Y.) 166; *Butler v. Standard F. Ins. Co.*, 4 Ont. Ap. 391; *Brit. Amer. Ins. Co. v. Joseph*, 9 L. Can. R. 448.

⁹ *Mills v. Farmers' Ins. Co.*, 37 Iowa, 400.

632. On a loss under a policy taken on grain in a warehouse, described as bran or wheat by the depositor, who held a warehouse receipt therefor, the insured need not prove the loss of the identical goods, but only of wheat, etc., in the warehouse of a similar character and quantity.¹ But the term "merchandise" in a policy on grain and other merchandise in warehouses to dealers does not include a platform scale bedded in the floor of one of the warehouses, nor the belting, nor a corn-sheller, nor a beam scale, which were needed in the business, but were not offered for sale; nor tools or implements purchased for use in the warehouse when necessary or convenient for the business.² In *Weisenberger v. Harmony F. & M. Ins. Co.*,³ a policy was issued on "refined oil in barrels contained in a cellar, etc.," and stipulated by a note on it that it was not to apply to oil in tanks; and a second policy was issued on "crude petroleum contained in three tanks." The place where the oil was, was a refinery of rock oil. Held first, that parol evidence was inadmissible to explain the note in the first policy which was clear; and secondly, that the character of the refinery and the words of the policies showed that refined and not lard oil was intended; and, therefore, that lard oil brought there for use in the refinery was not covered.

633. On a policy on a "woollen mill and contents," parol evidence is admissible to show what "contents" may be.⁴ In a policy on a "tannery and patent leather manufactory" it will be presumed that the intention was to include whatever was not expressly excepted and which was necessary and essential in the conduct of such a business.⁵ A policy on a "starch manufactory" includes "fixtures" and machinery.⁶ A policy, to a "blacksmith and carriage-maker," on goods manufactured and in process of manufacture, covers raw stock.⁷ In a policy on a paper mill the word "machinery" will include tools and implements, as well as machines.⁸ The term "engine and machinery" includes dies of iron used to give form to various utensils manufactured by the insured, which were used in

¹ *Clark v. West. Assur. Co.*, 25 U. C. Q. B. 209; *Wilson v. Cit. Ins. Co.*, 19 L. Can. J. 175.

² *Kent v. Liv. & Lond. Ins. Co.*, 26 Ind. 294.

³ 56 Pa. St. 442.

⁴ *Wheeler v. Traders' Ins. Co.*, 2 Kast. R. 136 (N. H.).

⁵ *Citizens' Ins. Co. v. McLoughlin*, 53 Pa. St. 485.

⁶ *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill. 553.

⁷ *Spratley v. Hart. Ins. Co.*, 1 Dil. 392 (D. Kan.).

⁸ *Buchanan v. Exchange F. Ins. Co.*, 61 N. Y. 26.

pairs and when not were kept lying on a shelf.¹ Patterns used in moulding castings, and of such size and shape as to be applied and removed by the hands of one man, are tools within the meaning of a policy insuring the "fixed and movable machinery, engine, lathes, and tools" of a manufacturer of machinery, parts of which are made by the use of such castings, and a provision excepting from the operation of the policy "jewels, plate, watches, ornaments, medals, patterns, printed music, etc., unless particularly specified," does not apply to such patterns.² A policy to packers on cattle, hogs, salt, cooperage, boxes, and articles used in packing in their establishment and yards covers coal in sheds used for the business.³ The words "stock in trade" were held to include tools, fixtures, implements, as well as the materials, in a policy on a bakery.⁴

634. A policy on a "new barque now being built" covers it in process of construction.⁵ But a policy on a barque on the stocks, being built for A., will not cover timbers not united to the keel or structure of the contemplated barque; although they were completely prepared and intended for use in the framework and lying in the yard to be applied, and were valueless for any other vessel.⁶ And a usage of another place is inadmissible to control the usage as to this in the port where the vessel was being built.⁷

635. The words of a policy on a portion of a railroad company's cars, "contained in house No. 1 and on engines contained in house No. 2," were held not merely descriptive, but a warranty that the cars and engines should be only paid for if destroyed in those places.⁸ A policy to a railroad company on its road furniture, consisting of locomotive engines, cars, and snow-ploughs, on the line of their road and in use, but not in machine or repair shops, covers cars left in the ordinary course of business on an iron track connected with the road, though not owned or controlled by the corporation.⁹

¹ *Seavy v. Central Mut. F. Ins. Co.*, 111 Mass. 540.

² *Lovewell v. Westchester F. Ins. Co.*, 124 Mass. 418.

³ *Phoenix Ins. Co. v. Favorite*, 49 Ill. 259.

⁴ *Moadinger v. Mechan. F. Ins. Co.*, 2 Hall (N. Y.), 490.

⁵ *Mason v. Franklin F. Ins. Co.*, 12 G. & J. (Md.) 468.

⁶ *Hood v. Manhattan F. Ins. Co.*, 11 N. Y. 532.

⁷ *Mason v. Franklin F. Ins. Co.*, 12 G. & J. (Md.) 468.

⁸ *A. & E. R. R. Co. v. Balto. F. Ins. Co.*, 32 Md. 37.

⁹ *Fitchburg R. R. Co. v. Charlestown F. Ins. Co.*, 7 Gray (Mass.), 64.

And a policy insuring "freight cars owned or used" by a railroad covers cars used and in their possession as carriers, though belonging to another corporation.¹ A policy insuring railroad property, "provided all the property insured is on premises owned or occupied by" the railroad, "it matters not whether the property is in motion on the road, at rest, or in the buildings," was held not to cover property on premises not used or occupied by the company at the date of the policy's issue, though so used and occupied at the loss.² Where trustees of a railway took a policy "on any property belonging to them as such, and as lessees on any property for which they may be liable, it matters not of what the property may consist, nor where it may be, provided the property is on premises owned or occupied by the said trustees, and situated on their railroad premises in the city of R.," it was held to cover a dredge boat they employed, and which was attached to their wharf at the terminus of the railroad in R.³ A policy upon "property in freight buildings" will not cover such articles as accounts, books, furniture, etc., specified in the policy to be not insurable unless by special agreement.⁴ Where a policy was issued to a railroad upon "any property upon which they may be liable in freight buildings or yards" of the company, it was held to cover merchandise belonging to other parties, for which the railroad is liable as a common carrier, although other common carriers are by contract bound to indemnify it against all such losses.⁵ A policy to a railroad on "all the wood and logs cut and piled along the line of the road" was held not to cover the contingent interest of the railroad in the wood and logs of other people endangered by its engines, which was not specifically described, and where the railroad has other property to which the terms readily apply. For presumably their interest in their own property was intended, and not a liability cast by a statute upon them to make good losses to property adjacent to the road-bed which might be injured by sparks from locomotives, which liability the statute also made an insurable interest.⁶

¹ *Commw. v. Hide & Leather Ins. Co.*, 112 Mass. 136.

² *Prov. & Worcester R. R. Co. v. Yonkers F. Ins. Co.*, 10 R. 1. 74.

³ *Farmers' Loan, Etc., Co. v. Harmony F. & M. Ins. Co.*, 51 Barb. (N. Y.) 33, 41 N. Y. 619.

⁴ *Commw. v. Hide & Leather Ins. Co.*, 112 Mass. 136.

⁵ *Ib.*

⁶ *Monadnock R. R. Co. v. Mfrs. Ins. Co.*, 113 Mass. 77.

636. Certain policies were issued to A. & Co., in whose warehouse whiskey was stored, and who were liable on the bond of a distiller, against loss or damage by fire "upon whiskey their own, or held by them in trust or on commission, etc., including the government tax thereon for which they may be liable." On a loss of their whiskey the amount, less the tax, was paid by the insurers, and the tax not having been paid the government sued and obtained judgment against A. & Co. on their bond. The insurers declined to take any part in this suit, and A. & Co. thereupon gave a bond which, under the laws of Kentucky, operated to satisfy the judgment, and then sued the insurers for the amount; and it was held that the policies were intended to furnish indemnity against the liability of A. & Co. as sureties on the bond of the distiller as well as their interest as owners of the whiskey.¹ In *Hedger v. Un. Ins. Co.*,² a policy on whiskey in bond in a distillery warehouse, without any reference to the tax, was held to cover the tax as well as the whiskey, as the distiller is liable on his bond for the tax, though the whiskey should be destroyed while in the warehouse.³ In the case of *Security Ins. Co. v. Farrell*,⁴ it was decided that the insurer was not liable for the amount of the tax in addition to the amount of the loss on the spirits destroyed in a distillery before the tax was paid, because the personal liability of the insured only arose upon the removal of the whiskey or breach of the condition of the bond, and the lien of the tax was only to prevent fraud and was meant to be paid by the consumer. But as this case was apparently decided on a misapprehension of the tax law as laid down in *Farrell v. U. S.*,⁵ it is, perhaps, of questionable authority.

637. It was stated in *Carr v. Roger Williams Ins. Co.*,⁶ that the word "premises" was never applied to personalty, but it has been held that it may be, if the context make it apparent that it was intended to be so applied.⁷

638. It has been stated in a previous part of this Treatise that to recover for loss of profits they must be insured as such.⁸ There-

¹ *Ins. Cos. v. Thompson*, 95 U. S. 547.

⁵ 60 N. H. 513.

² 17 Fed. R. 498 (D. Ky.).

⁷ *Beacon F. & L. Ins. Co. v. Gibb*, 7 L. Can. J. 57.

³ *Farrell v. U. S.*, 99 U. S. 221.

⁴ 2 *Ins. L. J.* 302 (Ill.).

⁸ *Ante*, § 131.

⁶ 99 U. S. 221. See *post*, § 1389.

fore, where one insures his "interest" in buildings that will not include loss of occupancy, which is in the nature of profits.¹

639. Where a policy is on personalty, which is described as contained in a certain building, it may be asserted as a general rule the policy becomes void when the *locus* is changed.² This conclusion has been reached by the Courts irrespective of a special clause against removal, though this clause often occurs.³ And sometimes this conclusion has been reached or strengthened by the fact that the insured was required to show on the loss that the property destroyed was contained in the same place as at the issue of the policy.⁴ For example, in *Lycoming Co. Ins. Co. v. Updegraff*,⁵ where the policy was on goods in a "new frame barn, wagon, and wareroom," in an alley, occupied as a warehouse, and there was subsequently erected a brick addition, in part on the same site, which necessitated the removal of part of the barn, it was held, on the destruction of the new building and remnant of the barn, that there could be no recovery in any event for any goods unless in the remnant of the barn and wareroom as originally built. Where the owner of a farm, on which were two barns, took a policy on "machine" in Barn No. 1 "while in any of the buildings insured," it was held that the policy covered the machine in the other barn which was insured by another company.⁶ *Sawyer v. Dodge Co. Mut. Ins. Co.*,⁷ is an illustration of where the words of a policy to a farmer on his cattle, crop, etc., was held sufficiently large to cover the crops stocked on a farm purchased since the issue of the policy.

640. A policy on goods in a certain building named, without further limit as to their situation, was held to cover them in whatever part of the building they may be at the time of the loss; although, at the time of the issuing of the policy, they were all in one

¹ *Menzies v. N. Brit. Ins. Co.*, 19 1 L. N. (Can.) 604; *First Nat. Bk. v. Scot. Jur.* 291. *Lancash. Ins. Co.*, 62 Tex. 461.

² See *Eddy St. Iron Foundry v. Hampdon, Etc., Ins. Co.*, 1 Clif. 300 (D. R. I.); *Hart. F. Ins. Co. v. Far-* ³ See *Gorman v. Hand-in-Hand Ins. Co.*, 11 Ir. R. C. L. 224.

rish, 73 Ill. 166; *Shertser v. Mut. F. Ins. Co.*, 46 Md. 506; *Md. F. Ins. Co. v. Gusdorf*, 43 Md. 506; *English v. Franklin F. Ins. Co.*, 55 Mich. 273; ⁴ *Harris v. Royal Can. Ins. Co.*, 53 Iowa, 236; *English v. Franklin F. Ins. Co.*, 55 Mich. 273.

⁵ 40 Pa. St. 311. ⁶ *Stillman v. Agricult. Ins. Co.*, 16 Ont. R. 145.

⁷ 37 Wis. 503.

store in the building, and a plan referred to in the policy showed that the building was divided into several stores, the reference to the plan appearing to be made solely to show the relative situation of the buildings to other buildings.¹ Where the policy is on property contained in the first floor and basement, a removal of the entire stock to the basement does not avoid, though the risk be greater.² And goods insured "in the third story of a building" were held covered when removed to another room subsequently hired in the same floor of same building.³ But a policy on goods in the "store part" of the building was held not to cover the articles subsequently removed to another part, which was used for different purposes and was in possession of other people.⁴ In *Griswold v. Amer. Ins. Co.*,⁵ it was held that an insured wooden building, which was removed a little distance without any increase of risk, but which still answered the same description as to locality, was covered. In Rhode Island a different rule as to this general point was asserted, and it was held that a policy on furniture "all contained in house No. 00 in M Street, would cover the articles when removed to another house in a different street."⁶

In *West. & A. Pipe Lines v. Home Ins. Co.*,⁷ a distinction was made between a voluntary change of *locus* of the thing insured and one that was brought about by the act of God. Here there was a warranty "on oil while contained in" tanks in a specified locality; a flood carried the tanks away to another part of the land, where they were burnt, and it was held a recovery lay.

641. Subject to the general rule, however, a distinction has been taken between property described as contained in a certain locality, in the sense of being absolutely maintained or stored in one place, in which case its removal is not contemplated, and property which from its very nature must be constantly removed, and therefore which the insurer only intended should be permanently though not literally kept in the *locus* described, and which the parties intended should be covered when removed for a legitimate object

¹ *Fair v. Manhattan Ins. Co.*, 112 Mass. 320.

² *Plinsky v. Germania F. & M. Ins. Co.*, 32 Fed. R. 47 (E. D. Mich.).

³ *West v. Old Colony Ins. Co.*, 9 Allen (Mass.), 316.

⁴ *Boynton v. Clinton, Etc., Ins. Co.*, 16 Barb. (N. Y.) 254.

⁵ 1 Mo. Ap. 97.

⁶ *Lyons v. Prov. Wash. Ins. Co.*, 13

R. I. 347.

⁷ 145 Pa. St. 346.

germane to the purpose for which the article was kept. Thus, insurance on wearing apparel subjects the insurer to liability if destroyed while in its ordinary use elsewhere than in the *locus* described.¹ For instance, a sealskin sacque insured as wearing apparel "contained in" a certain dwelling will be covered when burnt at a furrier's, where it was sent to be repaired, though the risk was thereby increased.² And a policy on a phaeton "contained in a frame barn" was held to mean that it should be "contained" there except when absent for purposes incident to its use; and that it was covered when absent in a carriage-shop for repairs.³ And so a description of a threshing machine "stored in barn" does not imply that it is always to be stored there.⁴ In Maine, while not repudiating the principle upon which this distinction rests, the Court held that a policy on a "frame stable building occupied by the insured as a hack, livery, and boarding stable;" and on "his carriages, sleighs, hacks, horses' harness, blankets, robes, and whips contained therein," could not cover a hack injured while being repaired an eighth of a mile away in another street, on the ground that the insurance was not intended to cover any particular article, but only an article contained in the described *locus*, like a policy on a stock of goods; and hence the *locus* was the only means of ascertaining which articles were meant; and therefore the article could only be intended when in the locality mentioned.⁵ But in Virginia a recovery under similar circumstances was allowed.⁶ A policy on two barns and certain articles "contained therein," and also a horse "in barn or in fields," was held to cover the horse, although in a barn not one of those specified.⁷ A policy was on a dwelling, barn, "on live stock therein," and hog-house, all situated in a certain section of land, and the insurer was only to be liable "upon the property described in the places herein set forth, and not elsewhere." At the issue of the policy the stock was in the barn, but was pastured in summer; and the death occurred in a new barn,

¹ *Longueville v. West. Assur. Co.*, 51 Iowa, 553. See also *Everett v. Continental Ins. Co.*, 21 Minn. 76.

² *Noyes v. Northw. Nat. Ins. Co.*, 64 Wis. 415.

³ *McCluer v. Girard F. & M. Ins. Co.*, 43 Iowa, 349.

⁴ *Everett v. Continen. Ins. Co.*, 21 Minn. 76.

⁵ *Bradbury v. F. Ass'n*, 80 Me. 396.

⁶ *Niag. F. Ins. Co. v. Elliott*, 85 Va. 962.

⁷ *Trade Ins. Co. v. Barracliff*, 45 N. J. L. 543.

put for convenience in the place where the stock was, and it was held the last clause in quotation referred back to the general description, but did not limit the stock to the old barn only, and that the insurer was liable.¹ A policy on "horses in use," or "running in pasture or yard on his farm in town L.," was held to cover them while "running in pasture at any place in the town of L."² And a policy with a lightning clause on a horse "contained in a barn," was held to cover it when killed at pasture.³ But in Ireland it has been held the policy is suspended till the subjects, such as horses, ploughs, etc., are returned to the place designated in the policy.⁴

642. The parties may, however, after the issue of the policy, agree that the insurance shall cover the subject-matter during its removal to some other locality; or when finally removed to such new place, the contract in other respects remaining as before.⁵ There was a policy against fire on a ship "lying in Victoria Docks," with liberty to go into a dry dock, to go to which latter it was necessary to remove her paddle wheels. After repairing in the dry dock she was moored in the river to have her paddles replaced, as was customary, though they might have been perfectly well replaced in the Victoria Dock, and it was held that the policy covered the vessel going to and coming from the dry dock, but not while lying moored in the river for a collateral purpose.⁶ Where the holder of a policy upon his goods in a certain store applied to the insurance company "to have it transferred to cover the goods in a new building," stating that the goods were to be moved that day, and the insurer agreed that the policy should be "transferred to cover similar property" in the new building, it was held that a loss by fire the next day before their removal was still covered.⁷ But where a policy on goods stipulated "that persons changing their habitations or warehouses might preserve their policies if circumstances of policy were not altered, but such insurance should be of

¹ *De Graff v. Queen Ins. Co.*, 38 Minn. 501.

² *Boright v. Springfield F. & M. Ins. Co.*, 34 Minn. 352.

³ *Haws v. Fire Ass'n*, 114 Pa. St. 431.

⁴ *Gorman v. Hand-in-Hand Ins. Co.*, 11 Ir. C. L. 224.

⁵ See *Hoffecker v. Newcastle Co. Mut. Ins. Co.*, 5 Hous. (Del.) 101.

⁶ *Pearson v. Commer. Un. Assur. Co.*, 1 Ap. Cas. 498.

⁷ *Kunzse v. Amer. Exchange F. Ins. Co.*, 41 N. Y. 412.

no force until the removal should be indorsed in the policy," and after the indorsement was made, but before the removal was completed, a large quantity of goods in the old store was destroyed, though goods to the value of the policy had been removed, it was held that there could be no recovery; for the insurance was not on two distinct properties in two places.¹ In *Sharpless v. Hart. F. Ins. Co.*,² the insurer agreed in July that as goods were "about to be removed" to X. "this policy shall cover *pro rata* in both places during removal, and thereafter in last-named location only." In November a loss occurred on articles placed in the new *locus* before and after July, but the amounts of each class were not known; and it was held that the agreement did not necessitate an immediate removal; nor was the insurance confined to articles removed after July.

It sometimes happens when a removal is allowed that the new *locus* is in some wise objectionable. As where there was a general prohibition against storing wine in the building where the goods were kept, and the goods were removed to a place where wine was stored, though it was held as the agent knew the fact the action lay.³

643. In Michigan, where the insurer's statute of organization⁴ permitted insurances on live stock, wagons, etc., "being upon farms used as farm property," and a by-law prohibited the insurance of village property within one hundred feet from other buildings, it was held that the insurer was not liable for horses, wagons, etc., insured "as personal farm property" which were destroyed in a barn of a village inn that stood within one hundred feet from other buildings; because, as it could not originally have been there insured, it could not logically be maintained that it could be indirectly covered when taken there, even in the way of business.⁵ But in Pennsylvania, where the charter provided that the business of the company should be confined to certain counties of a State, it was held not to prevent a recovery on horses there insured, but removed into other counties for sale, where they were burnt after being kept a reasonable time.⁶

¹ *McClure v. Lancash. Ins. Co.*, 6 Ir. Jur. n. s. 63.

² 140 Pa. St. 437.

³ *Rathbone v. City F. Ins. Co.*, 31 Conn. 193.

⁴ How. St. c. 132.

⁵ *Willey v. Farmers' Mut. F. Ins. Co.*, 52 Mich. 446.

⁶ *Coventry v. Mut. Live Stock Ins. Co. v. Evans*, 102 Pa. St. 281.

644. It is often said that the insurer is not liable for consequential or remote losses from a peril insured against, but only for those that are direct and immediate, or as the axiom is, *in jure, causa proxima, non remota, spectatur*.¹ The use of the word consequential, however, is perhaps not strictly accurate, for the insurer, though not liable for a remote loss, has been frequently held liable for a consequential loss. The phraseology of some Judges to the effect that a loss must not only be the natural, but the inevitable result of the peril insured against, is also too limited.² In *Tilton v. Hamilton F. Ins. Co.*,³ at page 383, Duer, C. J., laid down the following general rules: "It may be deduced," said he, "as a general rule, that insurers, whether on a marine or fire policy, are never liable for consequential losses, other than such as are physically or legally necessary, unless it appears not only that the property insured was involved in a peril insured against, but that it must have perished from that cause had the peril continued to operate. In fewer words, unless it appears that the loss, had it not been consequential, would have been immediate and total. The consequential loss for which the insurer is liable," he added, "may be divided into two classes . . . First. The insurer must satisfy every loss which is shown to have been, although not a necessary, a natural consequence of the peril insured against; and by natural is evidently meant a usual and probable consequence, and such, therefore, as it is reasonable to believe was in the contemplation of the parties when the insurance was effected. Hence, the insurers are bound to indemnify the assured against every loss that may be expected to follow from the means usually employed to avert or diminish the peril, and save the property insured from destruction in which it would otherwise be involved. . . . The second class of consequential loss for which the insurers are undoubtedly liable, as referable to the peril insured against as their proximate cause, embraces the cases in which the property insured is extricated from

¹ *Brooklyn L. Ins. Co. v. Bledsoe*, 52 Ala. 538; *Case v. Hartford F. Ins. Co.*, 13 Ill. 676; *Caballero v. Home Mut. Ins. Co.*, 15 La. An. 217; *Dyer v. Piscataqua F. & M. Ins. Co.*, 53 Me. 118; *Bradhurst v. Columbian Ins. Co.*, 9 John. (N. Y.) 17; *Mathews v. Howard Ins. Co.*, 11 N. Y. 9; *Hillier v. Allegheny Co. Mut. Ins. Co.*, 3 Pa. St. 470; *Peters v. Warren Ins. Co.*, 14 Pet. 99.

² See *Dyer v. Piscataqua F. & M. Ins. Co.*, 53 Me. 118; *Tilton v. Hamilton F. Ins. Co.*, 1 Bos. (N. Y.) 367.

³ *Supra*.

the peril that otherwise would have led to its destruction, by means that could not have been anticipated by the parties, but by which it is taken from and never again restored to the possession of the insured, so that to him the loss is exactly the same that it would have been had the peril continued to operate."

645. Though a few cases can be found which hold the insurer not liable when the loss is the result of negligence on the part of the insured,¹ the general rule is that if the peril insured against is the proximate cause the insured can recover, though guilty of negligence, as negligence is the remote cause.² And so the negligence of others or of the insured's servants is also no defence.³ In the *dicta* of many of the Judges upon this point, a distinction seems to have existed in their minds between a certain degree of negligence in

¹ *Grim v. Phoenix Ins. Co.*, 13 John. 31 How. Pr. (N. Y.) 508; *Whitehurst* (N. Y.) 451; *Clary v. Protection Ins. Co.*, Wr. (Oh.) 227; *Fulton v. Lancaster Ins. Co.*, 7 Oh. 325.

² *Busk v. Royal Exchange Assur. Co.*, 2 B. & Ald. 73; *Walker v. Maitland*, 5 B. & Ald. 171; *Dixon v. Sadler*, 5 M. & W. 405; *Redman v. Wilson*, 14 M. & W. 476; *Shaw v. Robberds*, 6 A. & E. 75; *Jameson v. Royal Ins. Co.*, 7 Ir. R. C. L. 126; *Rankin v. Amazon Ins. Co.*, 89 Cal. 203; *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230; *Mickey v. Burlington Ins. Co.*, 35 Iowa, 174; *Phoenix Ins. Co. v. Sullivan*, 39 Kan. 449; *Henderson v. West. M. & F. Ins. Co.*, 10 Rob. (La.) 164; *Ga. Ins. & Trust Co. v. Dawson*, 2 Gill (Md.), 365; *Md. F. Ins. Co. v. Whiteford*, 31 Md. 219; *Chandler v. Worcester Mut. F. Ins. Co.*, 3 Cush. (Mass.) 328; *Johnson v. Berkshire Mut. F. Ins. Co.*, 4 Allen (Mass.), 388; *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713; *Huckins v. People's Mut. F. Ins. Co.*, 31 N. H. 238; *Gove v. Farmers' Mut. F. Ins. Co.*, 48 N. H. 41; *Gates v. Madison Co. Mut. Ins. Co.*, 5 N. Y. 469; *Mathews v. Howard Ins. Co.*, 11 N. Y. 9; *Sturm v. Atlan. Mut. Ins. Co.*, 63 Ib. 77; *O'Brien v. Commer. F. Ins. Co.*, 6 J. & S. (N. Y.) 517; *Brown v. King's Co. Ins. Co.*, 31 How. Pr. (N. Y.) 508; *Whitehurst v. Fayetteville Mut. Ins. Co.*, 6 Jones (N. C.), 352; *Sherlock v. Globe Ins. Co.*, 1 C. S. C. R. (Oh.) 193; *Perrin v. Protection Ins. Co.*, 11 Oh. 147; *Germania Ins. Co. v. Sherlock*, 25 Oh. St. 33; *Enterprise Ins. Co. v. Parisot*, 35 Oh. St. 35; *Amer. Ins. Co. v. Insley*, 7 Pa. St. 223; *Citizens' Ins. Co. v. Marsh*, 41 Ib. 386; *Phoenix F. Ins. Co. v. Cochran*, 51 Ib. 143; *Cumberland Val. Mut. Protection Co. v. Douglas*, 58 Ib. 419; *Lebanon Mut. Ins. Co. v. Kepler*, 106 Ib. 28; *Karow v. Can. Ins. Co.*, 57 Wis. 1; *Gillespie v. Brit. Amer. F. & L. Assur. Co.*, 7 U. C. Q. B. 108; *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222; *Columbia Ins. Co. v. Lawrence*, 10 Ib. 507; *Waters v. Merch. Louisville Ins. Co.*, 11 Ib. 213; *Catlin v. Springfield F. Ins. Co.*, 1 Sum. 434 (D. Mass.); *Levi v. N. O. Mut. Ins. Ass'n*, 2 Woods, 63 (D. La.).

³ *Shaw v. Robberds*, 6 A. & E. 75; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507; *Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 416; *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713; *Gates v. Madison Co. Mut. Ins. Co.*, 5 N. Y. 469; *Perrin v. Protection Ins. Co.*, 11 Oh. 147.

the insured and where the negligence has been in a greater or very great degree. And one meets with the terms "gross negligence" or "negligence amounting to fraud."¹

If by the use of these expressions it is meant that the insured cannot recover when guilty of negligence, if he be also guilty of fraud, it is clear, though the latter part of the sentence might be omitted; for it is obvious that he could not recover where his act is tainted with fraud. But it seems to be meant, sometimes at least, that the insured cannot recover, though not guilty of fraud as that term is correctly understood—that is, having a *rea mens*—if he be guilty of gross negligence, which, though not designed, is yet extremely culpable; and there are *dicta* in support of that position.² It is difficult, however, to appreciate this position, and in New York it has been stated that gross carelessness on the part of the insured will not prevent recovery.³ Certain policies, however, have clauses of exception to the insurer's liability when the insured is guilty of "gross negligence," which has been stated to be the want of that diligence which even careless men are wont to exercise.⁴ Possibly, however, the Judges may mean by these expressions, if the negligence is so culpable that it may be submitted to the jury as evidence of fraud, and if found to constitute fraud, that then the insured cannot recover.

In *West. Horse and Cattle Ins. Co. v. O'Neill*,⁵ it was held that the insurer was not liable when there was a policy on a horse which the man brutally beat to death.⁶

646. Questions of remote and proximate losses sometimes arise when insurance is taken against loss on one's own land, and it is caused by a fire originally kindled on a neighbor's land, which has spread.

¹ See *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507; *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230; *Phoenix Ins. Co. v. Sullivan*, 39 Kan. 449; *Huckins v. People's Mut. F. Ins. Co.*, 31 N. H. 238; *Gove v. Farmers' F. Ins. Co.*, 49 Ib. 41; *Citizens' Ins. Co. v. Marsh*, 41 Pa. St. 386; *Cumberland Val. Mut. Protection Co. v. Douglas*, 58 Ib. 419; *Lebanon Mut. Ins. Co. v. Kepler*, 106 Ib. 28.

² See *Chandler v. Worcester Mut. F. Ins. Co.*, 3 Cush. (Mass.) 328; *Huckins v. People's Mut. F. Ins. Co.*, 31 N. C., 352.

³ *Gates v. Madison Co. Mut. Ins. Co.*, 5 N. Y. 469; *O'Brien v. Commer. F. Ins. Co.*, 6 J. & S. (N. Y.) 517.

⁴ *Campbell v. Monmouth Mut. F. Ins. Co.*, 59 Me. 430.

⁵ 21 Neb. 548.

⁶ See *Johnson v. Berkshire Mut. F. Ins. Co.*, 4 Allen (Mass.), 388; *Citizens' Ins. Co. v. Marsh*, 41 Pa. St. 386.

By the common law, where one kindles a fire on his land in such a negligent manner that it will spread, or negligently allow fire already kindled to spread to his neighbor's property, the original owner is liable for the damage.¹ The eighty-sixth section of the English Building Act,² to the effect that no action shall be maintained against any person in whose house or on whose estate any fire shall accidentally begin, is not confined in its operation to those districts to which the limited clauses of the Act are restricted. Nor does it apply where a fire is produced by negligence, nor where the fire is lighted intentionally and mischief happens to result.³ Where a dangerous agency like steam is made use of in a locomotive, which generates sparks, the railway company must use the best appliances to prevent fire.⁴ And it has been held that the presence of sparks is, *prima facie*, evidence of negligence.⁵ Several of the United States have created a statutory liability on the railway company for losses by fire caused accidentally by its locomotives on property along its route. With respect to proximate cause in such cases the rule is that if a building be burnt by the negligence of a man, which in turn sets fire to still another, and the more remote fire is a natural result of the nearer, it renders the original *tort feasor* liable, as the cause is proximate.⁶ There is a case in New York,⁷ and another in Pennsylvania,⁸ which seemingly oppose this rule, but later cases in the same State have apparently adopted the general rule.⁹ Possibly the presence of a high wind, which the *tort feasor* could not control, might change the rule, but he should show this.¹⁰

In *Metallic Compression Casting Co. v. Fitchburg R. R. Co.*,¹¹ where the only available means of putting out a fire was by laying a

¹ *Turberville v. Stamp*, Salk. 13; 2 & W. R'way Co., 59 Ill. 349; *Perley v. Ib.* 726; 12 Mod. 152; *Vaughan v. East. R. R. Co.*, 98 Mass. 414; *Webb v. Menlore*, 3 Bing. N. C. 468; *Higgins v. R. W. & O. R. R. Co.*, 49 N. Y. 420; *Pa. Dewey*, 107 Mass. 494. *R. R. Co. v. Hope*, 80 Pa. St. 373; *Kellogg v. C. & N. R. R. Co.*, 26 Wis. 223.

² 14 Geo. III. c. 78.

³ *Filliter v. Phippard*, 11 Q. B. 347.

⁴ *Brighthope R'way Co. v. Rogers*, 76 Va. 443.

⁵ *Piggot v. East. Counties R'way Co.*, 3 C. B. 227; *Field v. N. Y. Cent. R. R. Co.*, 32 N. Y. 339. See *Collins v. N. Y. Cent. R. R. Co.*, 5 Hun. (N. Y.) 503.

⁶ *Milwaukee & St. P. R'way Co. v. Kellogg*, 94 U. S. 469; *Fent v. Toledo P.*

⁷ *Ryan v. N. Y. Cent. R. R. Co.*, 35 N. Y. 210.

⁸ *Pa. R. R. Co. v. Kerry*, 62 Pa. St. 353.

⁹ See *Milwaukee & St. P. R'way Co. v. Kellogg*, 94 U. S. 469-474.

¹⁰ See *Turberville v. Stamp*, 12 Mod. 152; *Fent v. Toledo P. & W. R'way Co.*, 59 Ill. 349.

¹¹ 109 Mass. 277.

hose across a track, which had diminished and would probably have extinguished the fire, it was held that the fact of a train, in running over it, cut it, and which could have been stopped in time, gave the owner a cause of action against the railway company.

647. Where a warehouseman places grain, received from the owner to be stored, in a common bin with his own and that received from other depositors, and sells from this receptacle, retaining always sufficient to supply each owner, the contract continues one of bailment, and the warehouseman is not liable for a loss resulting from an accidental fire not attributable to his wrong or negligence.¹

648. As the insurance is on the building and not on the materials, the insurer is not liable if the building insured fall to ruins and take fire subsequently.² It was held, where there was a proviso in the policy that "if the building should fall except as the result of fire" the policy should determine, that so long as it stood, however it may have depreciated, the insurer was liable.³ And where a portion fell leaving about three-fourths standing it was held not a fallen building.⁴ In Massachusetts, where several buildings were insured by the same policy, and substantially all the floors and roof of one had fallen, it was held that that particular building, at least, was fallen, and, therefore, that neither the goods fallen into the *débris*, nor the ruined walls were at the underwriter's risk, when subsequently burned;⁵ though whether the insurer would have been liable for the goods in the standing portion was not decided. But in California goods left in a building three-fourths standing were held to be covered.⁶ And where under a policy effected on goods "contained in a granite store," one of the walls gave way, which caused half of the store and the whole of the adjoining building to fall, and, before there was time to remove the goods, a fire broke out in that building, it was held the insurers were liable.⁷ The words "wholly destroyed" in the Missouri and Wisconsin Statutes, in respect of buildings, mean when the building has so

¹ *Rice v. Nixon*, 14 Ins. L. J. 329 (Ind.).

² *Nave v. Home Mut. Ins. Co.*, 37 Mo. 430.

³ *Firemen's Fund Ins. Co. v. Congregation Rodeph Shalom*, 80 Ill. 558.

⁴ *Breuner v. Liv. & Lond. & Globe Ins. Co.*, 51 Cal. 101.

⁵ *Huck v. Globe Ins. Co.*, 127 Mass. 306.

⁶ *Ib.*

⁷ *Lewis v. Springfield F. & M. Ins. Co.*, 10 Gray (Mass.), 159.

lost its identity that its walls cannot be used as building walls, though they may still stand.¹ In Scotland, where a gable of another house injured by fire fell on the house insured, it was held that the company was liable, though the fire had been extinguished for two days.² But in England, where a wall was left standing after a fire which the agent notified the insurer was dangerous, and which, after a while, during a gale, did fall and injured the next house, it was held that the policy did not cover the loss caused by its fall.³

649. Where a ship is burnt to prevent capture,⁴ or where a house already on fire is blown up with gunpowder to stop the spread of flames, there being no means of extinguishing the fire by water, the insurer is liable.⁵ In some States a statute provides that the loss of an owner whose house is destroyed to prevent a conflagration should be paid for by the government.⁶ Though it seems that damages would not be recoverable under such a statute if the building, or the property therein, would inevitably have been destroyed by the fire, had not an order for its destruction been given by the magistrates.⁷

650. In *Austin v. Drewe*,⁸ the policy provided against all damage caused by fire to stock in a sugar refinery. There was an intense heat from the usual fires, owing to the great mismanagement of the flues on the part of the refiners, whereby the sugar was injured, and it was decided that there could be no recovery; as there had been no fire, and the injury resulted from the insured's own mismanagement.

In *Sohier v. Norwich F. Ins. Co.*,⁹ there was a proviso exempting the insurer from liability from the effects of a fire originating "in the theatre proper," and it was held that a brick wall, which became so heated from without as to set fire to the woodwork of the theatre, was not a fire originating within the building. In such a case the burden is on the plaintiff to show that the origin of the fire was not from within.¹⁰

¹ *Barnard v. Nat. F. Ins. Co.*, 38 Mo. Ap. 106; *Seyk v. Millers' Nat. Ins. Co.*, 74 Wis. 67.

² *Johnston v. West of Scotland Ins. Co.*, 7 C. S. C. (1st Ser.) 52.

³ *Gaskarths v. Law Un. F. Ins. Co.*, 6 Ins. L. J. 159 (England).

⁴ *Gordon v. Rimmington*, 1 Camp. 123.

⁵ *Greenwald v. Ins. Co.*, 3 Phila. 323.

⁶ *Mayor of N. Y. v. Lord*, 17 Wend. (N. Y.) 285.

⁷ *Ib.*

⁸ 6 Taunt. 436.

⁹ 11 Allen (Mass.), 336.

¹⁰ *Sohier v. Norwich F. Ins. Co.*, 11

Allen (Mass.), 336.

651. The insured is liable for injuries caused by water used to extinguish the thing on fire.¹ And perhaps from water thrown on an adjoining building on fire.² He is also liable for goods injured or lost during a removal from a building in imminent danger of fire.³ The insurer is also liable for the theft of property during the removal from a building on fire or in imminent danger of fire.⁴ And it has been held that a theft occurring immediately after the fire at the ruins is covered.⁵ But the danger of the fire must be imminent, and the insured must be justified in the removal, for the mere apprehension of fire, even if reasonable, will not justify a removal, or cover a theft therein.⁶ The jury are judges of the necessity.⁷ Where the policy provided that "in case of the removal of property to escape conflagration the company will ratably contribute to the loss and expenses attending such act of salvage," it was held on the loss, and injury to the goods during their removal by the insured to escape the fire, that the provision merely referred to the expenses incurred in saving what had escaped destruction, and was not intended to stipulate that the insured should not be indemnified for any part of the damage which his property had suffered, which was fairly covered by the insurance.⁸ And where the insured is obliged by the terms of the policy to labor at saving the goods the insurer is liable for a theft during such work.⁹ A provision that the insurer should not be liable for loss or damage to goods contained in the show windows of a shop, which was caused by the light in the

¹ *Geisek v. Crescent Mut. Ins. Co.*, 19 La. An. 297; *Lewis v. Springfield F. & M. Ins. Co.*, 10 Gray (Mass.), 159; *Whitehurst v. Fayetteville Mut. Ins. Co.*, 6 Jones (N. C.), 352; *Independent Mut. Ins. Co. v. Agnew*, 34 Pa. St. 96; 3 Phila. 193.

² *Lewis v. Springfield F. & M. Ins. Co.*, 10 Gray (Mass.), 159.

³ *Balestracci v. Firemen's Ins. Co.*, 34 La. An. 844; *Holtzman v. Franklin Ins. Co.*, 4 Cranch, 295 (D. of Colum.); *McLaren v. Commer. Un. Assur. Co.*, 7 Ont. R. 64.

⁴ *Leiber v. Liv. & Lond. & Globe Ins. Co.*, 6 Bush (Ky.), 639; *Wetherell v. Me. Ins. Co.*, 49 Me. 200; *Tilton v. Hamilton F. Ins. Co.*, 1 Bos. (N. Y.)

367; *Whitehurst v. Fayetteville Mut. Ins. Co.*, 6 Jones (N. C.), 352; *Lukens v. Ins. Co.*, 25 Leg. Int. 61; *Agnew v. Ins. Co.*, 3 Phila. 193 (Pa.); *Independent Mut. Ins. Co. v. Agnew*, 34 Pa. St. 96; *McGibbon v. Queen Ins. Co.*, 10 L. Cas. Jur. 227.

⁵ *Newmark v. Liv. & Lond. F. & L. Ins. Co.*, 30 Mo. 160.

⁶ *Hillier v. Allegheny Co. Mut. Ins. Co.*, 3 Pa. St. 470; *Lukens v. Ins. Co.*, 25 Leg. Int. (Pa.) 61.

⁷ *Lukens v. Ins. Co.*, 25 Leg. Int. (Pa.) 61.

⁸ *McLaren v. Commer. Un. Assur. Co.*, 7 Ont. R. 64.

⁹ *Talamon v. Home, Etc., Ins. Co.*, 16 La. An. 426.

window, nor "for loss by theft," was held to mean theft from the show windows, and not theft during a removal during a fire.¹

In *Marsden v. City & Co. Assur. Co.*,² a policy on the plate glass in the plaintiff's shop front insured against any "loss or damage originating from any cause whatsoever, except fire, breakage during removal, alteration, or repair of premises," none of the glass being "horizontally placed or movable." A fire broke out on the premises adjoining those of the plaintiff and slightly damaged the rear of his shop, but did not approach that part where the plate glass was. Whilst the plaintiff, assisted by some neighbors, was removing his stock and furniture to a place of safety, a mob, attracted by the fire, tore down the shop shutters, and broke the windows for the purpose of plunder, and it was held that the proximate cause of the damage was the lawless act of the mob, and did not originate from "fire or breakage during removal" within the exception in the policy. Where there was a proviso of non-liability for loss by theft during or subsequent to a fire, and the fire warden, whose duty was to advise the parties insured "as to the removal or disposition of their property, and in case of their refusal to intervene in behalf of parties concerned," advised the insured to remove his property, and a portion of it was stolen during the removal, and it was held that the clause exempted the insurer, as the insured had acted under no compulsion.³

A condition that the insurer shall not be responsible for theft at or after any fire would probably not apply if the authorized agent of the insurer took sole and exclusive possession of the goods.⁴ While the rule as to *causa proxima* is general, the parties may, of course, contract to be bound by some other.⁵

652. Where the amount of a policy, on various specific items of property, is allotted in a specified amount on each item, if the damage to a specific item does not absorb the whole amount allotted, the surplus cannot be diverted to cover the excess of loss over the sum allotted to another item mentioned in the policy.⁶ In a policy

¹ *Leiber v. Liv. & Lond. & Globe Ins. Co.*, 6 Bush (Ky.), 639.

² L. R. 1 C. P. 232.

³ *Fernandez v. Merch. Mut. Ins. Co.*, 17 La. An. 131.

⁴ See *Liv. Lond. & Globe Ins. Co. v. Creighton*, 51 Ga. 95.

⁵ *Savage v. Corn Exchange, Etc., Ins. Co.*, 4 Bos. (N. Y.) 1.

⁶ *Carlwitz v. Germania F. Ins. Co.*, 12 Ins. L. J. 127 (D. N. J.).

in a specified amount on his barns \$; on his barn and shed \$; and on his hay therein \$, it was held on a loss of the hay contained in the barn and shed in the meadow, that while the word "therein" might refer to the barn and shed in the meadow, or to all the buildings capable of containing hay, there was no principle of law by which the whole sum insured on the hay could be so apportioned among the different parcels of property, that no greater sum could be recovered for the loss than a sum that shall bear the same ratio to the amount of insurance on the hay that the value of the hay in the barn and meadow bore to the whole value of the hay contained in all the buildings named.¹

653. In *Travis v. Peabody Ins. Co.*,² a promise to keep insured a stock of goods up to a specified amount was held immaterial where no damage was shown. Where a general agent of several insurers agreed to insure in a specified amount in his companies, it was considered that the intention was that each company would issue a policy in a like amount, or, in other words, divide the risk equally among them.³

Questions of fact are, of course, to be submitted to the jury. As to whether a particular article was intended to have been included in the policy.⁴ Or the accuracy of the description.⁵ Or whether a distant fire is in point of fact the proximate or remote result of the original cause.⁶

¹ *Rix v. Mut. Ins. Co.*, 20 N. H. 198. *Mut. L. Ins. Co.*, 3 Ins. L. J. 89 (S. D.

² 28 W. Va. 583.

N. Y.).

³ *Fitton v. Phoenix Assur. Co.*, 25 Fed. R. 880 (D. Vt.).

⁴ *Toledo P. & W. R'way Co. v. Pin-*

⁴ *Tesson v. Atlan. Mut. Ins. Co.*, 40 Mo. 33; *Franklin F. Ins. Co. v. Upde-*

dar, 53 Ill. 447; *Fent v. Toledo P. &*

W. R'way Co., 59 Ill. 349; *Webb v.*

Rome, Eto., R. R. Co., 49 N. Y. 420;

Pa. R. R. Co. v. Hope, 80 Pa. St. 373;

⁵ *Continental Ins. Co. v. Ware*, 9 Ins. L. J. 519 (Ky.); *De Camp v. N. J.*

Milwaukee, Eto., R. R. Co. v. Kellogg,

94 U. S. 469.

CHAPTER III.

VACANCY AND DISUSE.

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654. A vacancy or disuse of the insured premises is not *primâ facie* an increase of risk, nor does it, *primâ facie*, come within the

clause as to increase of risk.¹ And it has been held that the evidence of experts to show that the risk is greater in vacant than in occupied buildings is inadmissible.² But it has been held that one test of the increase of risk is whether the insurer would have charged a higher premium, and as that matter is peculiarly within the knowledge of experts, such evidence is admissible to show that a higher premium is charged by insurers generally for insuring vacant premises.³ Though the particular habit of the defendant to do so would not be admissible unless the insured was aware of it.⁴ A general custom for companies never to take a risk on vacant properties in the locality in which the property was, is admissible when there was a clause to notify the insurer of any material change or increase of risk.⁵ But the secret instructions of the insurer to his agent will not affect the insured.⁶ It has been held that there is no usage in Louisiana requiring the owner to keep his untenanted house guarded.⁷

655. Where there is a clause for forfeiture for disuse or vacancy this must be kept.⁸ Where a proviso as to vacancy exists it is of course immaterial whether the risk is increased by the vacancy or not.⁹ Though in Maine by the statute¹⁰ the vacancy must be material and increase the risk in order to create a forfeiture.¹¹ In Maine the

¹ *Gamwell v. Merch. & Farmers' Mut. F. Ins. Co.*, 12 Cush. (Mass.) 167; *Residence F. Ins. Co. v. Hannawold*, 37 Mich. 103; *Becker v. Farmers' Mut. F. Ins. Co.*, 48 Mich. 610; *O'Neil v. Buffalo F. Ins. Co.*, 3 N. Y. 122; *Herrman v. Merch. Ins. Co.*, 81 N. Y. 184; *Hawkes v. Dodge Co. Mut. Ins. Co.*, 11 Wis. 188; *Gould v. Brit. Amer. Assur. Co.*, 27 U. C. Q. B. 473.

² *Thayer v. Prov. Wash. Ins. Co.*, 70 Me. 531; *Cannell v. Phoenix Ins. Co.*, 59 Me. 582; *Mulry v. Mohawk Val. Ins. Co.*, 5 Gray (Mass.), 541; *Luce v. Dorchester Mut. F. Ins. Co.*, 105 Mass. 297; *Liv. & Lond. & Globe Ins. Co. v. McGuire*, 52 Miss. 227; *Kirby v. Phoenix Ins. Co.*, 9 Lea (Tenn.), 142.

³ *Luce v. Dorchester Mut. F. Ins. Co.*, 105 Mass. 297.

⁴ *Ib.*

⁵ *Kirby v. Phoenix Ins. Co.*, 13 Lea (Tenn.), 340.

⁶ *Joy v. Pa. Ins. Co.*, 35 Mo. Ap. 165.

⁷ *Soye v. Merch. Ins. Co.*, 6 La. An. 761.

⁸ *Continen. Ins. Co. v. Kyle*, 124 Ind. 132; *Burlington Ins. Co. v. Gibbons*, 43 Kan. 15; *Farmers' & Drovers' Ins. Co. v. Curry*, 13 Bush (Ky.), 312; *Boyd v. Ins. Co.*, 90 Tenn. 212; *Cardinal v. Dominion F. & M. Ins. Co.*, 3 L. N. (Can.) 367.

⁹ *Dennison v. Phoenix Ins. Co.*, 52 Iowa, 457. See *Cook v. Continen. Ins. Co.*, 70 Mo. 610.

¹⁰ R. S. 1861, c. 34, sec. 4.

¹¹ *Cannell v. Phoenix Ins. Co.*, 59 Me. 582; *Thayer v. Providence Wash. Ins. Co.*, 70 Me. 531; *Lancy v. Home Ins. Co.*, 82 Me. 492; *White v. Phoenix Ins. Co.*, 83 Me. 279.

presumption apparently is that a vacancy increases the risk.¹ But the question as to whether it does is not for an expert.² Under the statute the insurer has the burden of showing a material increase of risk by the vacancy.³ It makes no difference that the insured does not know that the premises are vacant; for the condition as to vacancy is not a question of good faith, but an obligation not to allow a certain state of things to occur;⁴ and applies when it occurs whether with or without the control or agency of the insured.⁵ When the policy is avoided because of a breach of a warranty of a vacancy, a subsequent reoccupancy does not revive it.⁶ And it is immaterial that the loss is not the result of the vacancy.⁷ A vacancy of the premises cannot be said to be provided against by such a clause as that the policy shall be avoided "if any change be made as to tenants or occupancy of the premises," or by a "change of occupation," or by a "change in condition or circumstances," and the like.⁸

656. A policy on a house described as a "dwelling" is not an implication that the building is occupied.⁹ And the words "occupied as a dwelling,"¹⁰ or "occupied by the insured,"¹¹ have been held not to imply a continuous occupation. In *Boardman v. N. H. Mut. F. Ins. Co.*,¹² "occupied by cabinet-makers" was held not to be avoided by a subsequent vacancy. But a house "to be occupied as a dwelling when completed," if so occupied and then vacant,

¹ *White v. Phoenix Ins. Co.*, 83 Me. 279. (Pa.) 189; *Gilliat v. Pawtucket Mut. F. Ins. Co.*, 8 R. I. 282; *Foy v. Ætna Ins. Co.*, 3 Allen (N. B.), 29; *Gould v. Brit. America Assur. Co.*, 27 U. C. Q. B. 473.

² *Ib.*

³ *Ib.*

⁴ *Dennison v. Phoenix Ins. Co.*, 52 Iowa, 457; *Cook v. Continental Ins. Co.* 70 Mo. 610; *Moore v. Phoenix F. Ins. Co.*, 7 East. R. 202 (N. H.); *Farmers' Ins. Co. v. Wells*, 42 Oh. St. 519; *McClure v. Watertown F. Ins. Co.*, 90 Pa. St. 277.

⁵ *Dennison v. Phoenix Ins. Co.*, 52 Iowa, 457.

⁶ *Moore v. Phoenix Ins. Co.*, 62 N. H. 240.

⁷ *Ib.*

⁸ *Somerset Co. Mut. F. Ins. Co. v. Usaw*, 112 Pa. St. 80; *McAnnally v. Somerset Co. Mut. Ins. Co.*, 2 Pitts. R.

(Pa.) 189; *Gilliat v. Pawtucket Mut. F. Ins. Co.*, 8 R. I. 282; *Foy v. Ætna Ins. Co.*, 3 Allen (N. B.), 29; *Gould v. Brit. America Assur. Co.*, 27 U. C. Q. B. 473.

⁹ *Browning v. Home Ins. Co.*, 71 N. Y. 508; *Woodruff v. Imperial F. Ins. Co.*, 83 Ib. 133; *Alexander v. Germania F. Ins. Co.*, 2 Hun. (N. Y.) 655.

¹⁰ *O'Neil v. Buffalo F. Ins. Co.*, 3 N. Y. 122; *Somerset Co. Mut. F. Ins. Co. v. Usaw*, 112 Pa. St. 80; *Liv. & Lond. & Globe Ins. Co. v. McGuire*, 52 Miss. 227.

¹¹ *Joyce v. Me. Ins. Co.*, 45 Me.

¹² 20 N. H. 551.

was held forfeited by the vacancy clause.¹ And it has been held where the building was described as "occupied as a dwelling" when in fact it was unfinished and never occupied by any one, that it was a breach of warranty.² To avoid a policy on a building "while occupied as a country store and dwelling," which also had a clause against vacancy, it was held that the building must not only cease to be occupied as a dwelling, but that it must also cease to be occupied at all.³ A "house tenanted" has been held not to be a warranty.⁴ And the phrase "will be occupied by a tenant" has been held not to mean anything.⁵ A clause that thirty days' disuse of a building shall avoid the policy is not a limitation of the insurance, but a condition of the contract.⁶ And a change from use to disuse is a change as to "use and occupation" within a statute.⁷ Where the forfeiture was, "if a building be vacant or unoccupied and so remain," a vacancy at the issue of the policy and at the loss forfeits.⁸ But if the policy is to be forfeited if the building should "cease to be occupied as a dwelling," and it is issued on a vacant house which was subsequently occupied, but became vacant before the loss, it was held a recovery lay.⁹ Where the clause stated that there should be a forfeiture if the building should be "vacant or unoccupied and so remain," and the insured stated at the time of a renewal that the property would remain vacant for a few weeks, and the agent replied that the policy would not avail unless occupied, it was held, though a waiver to the time of renewal, that a loss a week later discharged the company.¹⁰ In *Newmarket Savings Bank v. Royal Ins. Co.*,¹¹ where it was stamped in print that a dwelling and barn "were occupied for dwelling purposes only," followed by a written "permission to remain vacant thirty days without prejudice;" and that "if the premises insured shall

¹ *Royal Ins. Co. v. Lubelsky*, 86 Ala. 530.

² *Cannell v. Phoenix Ins. Co.*, 59 Me. 582.

³ *Pottsville Mut. F. Ins. Co. v. Fromm*, 100 Pa. St. 347.

⁴ *Ib.*

⁵ *Short v. Home Ins. Co.*, 90 N. Y.

⁶ *Un. Mut. Acc. Ass'n v. Riel*, 3 Ill. Ap. 414.

⁷ *Bennett v. Agricult. Ins. Co.*, 106 N. Y. 243. See *Royal Ins. Co. v. Lubelsky*, 18 Ins. L. J. 868 (Ala.).

⁸ *Schultz v. Merch. Ins. Co.*, 57 Mo. 331; *Hough v. City F. Ins. Co.*, 29 Conn. 10.

⁹ *Hotchkiss v. Home Ins. Co.*, 58 Wis. 297.

¹⁰ *Herrick v. Un. Mut. F. Ins. Co.*, 48 Me. 559.

¹¹ 150 Mass. 374.

become vacant by the removal of the owner or occupant, and so remain for more than thirty days," there should be a forfeiture unless a written assent; and there was a known vacancy at the inception of the risk and then for seven months, it was held that the vacancy should only have lasted thirty days. An indorsement that a "dwelling-house being unoccupied for a short time, but being in charge of a trusty person living near, shall be no prejudice to this policy," was held to apply to subsequent vacancies as well as to the one immediately following the permit.¹ In *Wastum v. City F. Ins. Co.*,² it was stipulated that unoccupied premises must be so insured, and that if houses, barns, etc., insured "as occupied" should become unoccupied the policy would be forfeited. The policy was, however, silent as to the occupation of these particular premises, though the agent knew that they were occupied at the issue of the policy; and it was held that a future vacancy would avoid.

657. A policy on a house to be forfeited if the "premises shall be vacant," was held to mean the house, not the land.³ And in a policy on a house providing that "if the premises shall become vacant or unoccupied, or if the property insured being a mill or manufactory shall cease to be operated, and so remain for a period of more than fifteen days," the words "so remain" included a house as well as a mill.⁴ A proviso of forfeiture in a policy on a hog-house that "if the premises were vacated by the removal of the owner or occupant," was held to mean all the premises generally, and not to apply to the disuse of the hog-house, as the language was inappropriate to such an idea.⁵ In a policy on the insured's summer residence, the out-buildings appurtenant, farm-house, barn, etc., and upon the furniture and personal property upon the farm, the different items of property were separately stated, with the amount of insurance on each. There was a condition of avoidance in case "the above-mentioned premises . . . become vacant or unoccupied," etc., and it was held that the fact that one farm-house and other buildings remained occupied was not a performance of

¹ *Steen v. Niag. F. Ins. Co.*, 89 N. Y. 315.

⁴ *Miaghan v. Hartford F. Ins. Co.*, 24 Hun. (N. Y.) 58.

² 15 Wis. 138.

⁵ *Kimball v. Monarch. Ins. Co.*, 70

³ *Sexton v. Hawkeye Ins. Co.*, 69 Iowa, 513. Iowa, 99.

the condition, as the words "above-mentioned premises" were to be used distributively, and to be applied to each item of property as separately stated in the policy.¹ A building described as a "tenement frame block" is not "unoccupied" within the meaning of a proviso for forfeiture whenever the building shall be unoccupied, if two of the tenements are in actual use and occupation as residences.²

658. A dwelling to be occupied must, as a rule, be used as the usual abode of one or more human beings.³ When people move and merely leavesome one to look after a house, it is a vacancy.⁴ A supervision by visits at intervals is not occupation.⁵ Holding the keys, but sleeping elsewhere, is not occupation.⁶ Though it has been held that a house which is not abandoned, but furniture and clothing are left while the insured with her daughter sleep next door, is "occupied."⁷ But a house which is only used for meals, and a barn for storing, by parties working on a neighboring farm, are vacated and unoccupied.⁸ A house and barn were described in a policy with a vacancy clause as occupied by a tenant, and on the insured stating that the tenant had left, but that the owner's men would do farm-work on the premises, and while there would live in the house, "occupied for dwelling and farm purposes" was indorsed. In point of fact the farmer lived two miles off, though the men ate, cooked, and slept there, when they had work to do in that place, but otherwise no one slept there; and it was held that there could be no recovery.⁹ In respect of houses, it has, however, been held that sleeping in a house is occupying it, though the insured resides elsewhere.¹⁰ And the presence of care-takers, or persons engaged in repairing, is sufficient.¹¹ It has

¹ *Herman v. Adriatic F. Ins. Co.*, 85 N. Y. 162.

² *Harrington v. Fitchburg Mut. F. Ins. Co.*, 124 Mass. 126.

³ *Herman v. Adriatic F. Ins. Co.*, 85 N. Y. 162; *Weidert v. State Ins. Co.*, 19 Oreg. 261.

⁴ *Bonenfant v. Amer. F. Ins. Co.*, 76 Mich. 653.

⁵ *Paine v. Agricult. Ins. Co.*, 5 T. & C. (N. Y.) 619; *Herman v. Adriatic F. Ins. Co.*, 85 N. Y. 162.

⁶ *Sonneburn v. Mfrs. Ins. Co.*, 44 N. J. L. 220.

⁷ *Gibbs v. Continental Ins. Co.*, 13 Hun. (N. Y.) 611.

⁸ *Ashworth v. Builders' Mut. F. Ins. Co.*, 112 Mass. 422.

⁹ *Fitzgerald v. Conn. F. Ins. Co.*, 64 Wis. 463.

¹⁰ *Watertown F. Ins. Co. v. Grehau*, 74 Ga. 642.

¹¹ *Hartford F. Ins. Co. v. Smith*, 3 Colo. 422; *Imperial Ins. Co. v. Kiernau*, 83 Ky. 468; *Stensgaard v. Nat. F. Ins. Co.*, 36 Minn. 181.

been held that brief temporary absences of a few days for business or duty do not come within such clauses as "vacant or unoccupied;"¹ or "unoccupied and to remain so;"² or if the dwelling "become vacated by the removal of the owner or occupant;"³ or vacated.⁴

659. It has been stated that the insurer's knowledge of the use of the building may affect the construction of the clause. Thus, a usual summer residence, known to the insurer to be such, has been held occupied when visited once a week during non-residence.⁵ In New York the clause "vacant and unoccupied" in a policy on a summer residence was held not to be avoided by a winter absence, but the clause was distinguished from "vacant or unoccupied."⁶ In *Vanderhoef v. Agricultural Ins. Co.*,⁷ the application stated that there would be a vacancy during the "farming season," and a policy was issued describing a disuse during "the summer." There was a clause as to vacancy; and it was allowed to be shown that the term "summer" might mean more than three months, and was used as a synonym for "farming season;" and that the policy had originally contained no permit as to vacancy, but had been sent back to conform to the agreement for insurance, and been returned with the words "during the summer" inserted.

660. Where there was a clause of forfeiture if "wholly or partially vacant, or unoccupied for purposes not indicated," and the tenant moved out on September 26th, and on October 1st a loss occurred, the owner living a mile off, but spending a part of each day in the house, though not at night, it was held a breach.⁸ In *Abrahams v. Agricultural Mut. Assur. Ass'n*,⁹ the policy provided that "unoccupied dwelling-houses, with exceptions undermentioned, are not insured by this association, nor shall it be answerable for any loss which may happen to any dwelling-house while left without an occupant or person actually residing therein; the temporary ab-

¹ *Stupetski v. Trans-Atlan. F. Ins.*

Co., 43 Mich. 373; *Springfield F. & M.*

Ins. Co. v. McLimans, 28 Neb. 846;

Johnson v. N. Y. Bowery F. Ins. Co.,

39 Hun. (N. Y.) 410.

² *Laselle v. Hoboken F. Ins. Co.*, 43

N. J. L. 468.

³ *Cummins v. Agricult. Ins. Co.*, 67

N. Y. 260.

⁴ *Franklin F. Ins. Co. v. Kepler*, 95

Pa. St. 492.

⁵ *West. Assur. Co. v. Mason*, 5 Brad.

(Ill.) 141.

⁶ *Herrman v. Merch. Ins. Co.*, 81 N.

Y. 184.

⁷ 46 Hun. (N. Y.) 328.

⁸ *Feshe v. Council Bluffs Ins. Co.*,

74 Iowa, 676.

⁹ 40 U. C. Q. B. 175.

sence of a member or his family, however, none of the household effects being removed, is not to be construed into non-occupancy; and this condition is not construed to apply to the temporary non-occupation of small dwellings for the accommodation of hired help on a farm, the main dwelling on the same continuing to be occupied; but the main dwelling must not be unoccupied for longer than forty-eight hours at any one time." A tenant leased the house of the insured, a mile off, and had removed his goods within forty-eight hours before the fire, but no one had resided in it for ten days before the fire, and there had been a distraint on it, though the landlord did not suppose that the tenant would leave till after the date of the fire, and had a new tenant ready; it was held that the forty-eight hour exception only applied to dwellings on that farm, and that the provision was broken. In *Sleeper v. N. H. Ins. Co.*,¹ the forfeiture was to occur if the premises occupied by a tenant should be "vacated by the removal of the owner or occupant;" the tenant left in July and meant to return later, though no time was fixed, and he left some furniture, but it was held vacated. In *Bennett v. Agricultural Ins. Co.*,² the policy was to cease when the dwelling-house "should cease to be occupied as such," and a loss by a fire occurred about a day after the tenant had left, though the fire was smouldering when he left, and it was held there could be no recovery. Under the phrase "vacant and unoccupied," there can be no recovery when a tenant quits without an intention to return, though a little furniture is left in the house, but of scarcely any value.³ And where the insured moved out, but left a bedstead and strips of carpet, and his son slept there a few weeks and then left, it was held a vacancy.⁴ And leaving a bed and other articles in a house with the *animus revertendi* is yet a vacancy.⁵

Will the retention of the keys by a tenant create an occupancy after he has notified the landlord?⁶ The fact that some of the tenant's furniture remained in the house and that he has retained

¹ 56 N. H. 401.

⁴ *Hartshorne v. Agricult. Ins. Co.*, 50

² 50 Conn. 420; 51 Ib. 504. See also *N. J. L.* 427.

Snyder v. Fireman's Fund Ins. Co., 78 Iowa, 146.

⁵ *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64.

³ *Moore v. Phoenix Ins. Co.*, 7 East. R. 202 (N. H.); *Richards v. Continen. Ins. Co.*, 83 Mich. 508.

⁶ *Amer. Ins. Co. v. Padfield*, 78 Ill. 167.

the key, though he had moved into another house where he took his meals, is not an occupancy.¹

Where a tenant moves out, and it is contemplated to let to another, it has been held that, if the house be vacant for a few days between whiles it is unoccupied within the clause.² Furnishing a house for an expected tenant does not create an occupancy.³ Though in other Courts the insured has been allowed a "reasonable time" to prepare for a new tenant.⁴ And this has *a fortiori* been held when the words "and so remain" were in the clause.⁵

In Mississippi, where the insurance was of a family residence occupied by a tenant, and a vacancy followed, it was held that an occupation by a tenant without the insured's knowledge, as a tavern, was a vacancy within the clause.⁶ Where the policy was to be forfeited if the barn "whether intended for occupancy by owner or tenant be or become vacant or unoccupied, and so remain for ten days," it was held that the clause meant to give the same effect to a vacancy by the tenant as by the owner.⁷

In a policy on a summer hotel it was "warranted a family to live in said house through the year," and it was held not to be fulfilled by two workmen keeping their trunks and sleeping there, but who worked and took their meals elsewhere.⁸ Where a school-house was left unoccupied for several months during the summer holidays, it was held "vacant and unoccupied."⁹

661. A policy on a ship "while lying at anchor," with a forfeiture clause on a vacancy of "the premises," was held forfeited when the ship was hauled upon the beach some distance above high water, with her furniture removed, and fastened by an anchor and iron rails.¹⁰

¹ *Corrigan v. Conn. F. Ins. Co.*, 122 Mass. 298.

⁵ *Ins. Co. v. Garland*, 108 Ill. 220.

⁶ *West. Assur. Co. v. MoPike*, 62

² *Ætna Ins. Co. v. Meyers*, 63 Ind.

Miss. 740.

³ *Ridge v. Scot. Commer. Ins. Co.*,

⁷ *England v. Westchester F. Ins.*

⁹ *Lea (Tenn.)*, 507.

Co., 81 Wis. 583.

⁸ See *Barry v. Prescott Ins. Co.*, 35

⁸ *Poor v. Humboldt Ins. Co.*, 125

Hun. (N. Y.) 601; *Litch v. N. Brit. &*

Mass. 274. But see contra in *Poor v.*

Mercant. Ins. Co., 136 Mass. 491. See

Hudson Ins. Co., 2 Fed. R. 432 (D.

also *Doud v. Cit. Ins. Co.*, 141 Pa. St.

N. H.).

47.

⁹ *Amer. Ins. Co. v. Foster*, 92 Ill.

⁴ See *Phoenix Ins. Co. v. Zucker*, 9

334.

Ins. L. J. 193 (Ill.); *Schackelton v.*

¹⁰ *Reid v. Lancaster F. Ins. Co.*, 90

Sun F. Office, 55 Mich. 288; *Eddy v.*

N. Y. 382.

Hawkeye Ins. Co., 70 Iowa, 472.

662. A policy on boilers and machinery "used in the business of manufacturing leather and morocco" in a designated building, with a proviso that if the "premises shall become vacant or unoccupied," it shall be forfeited, was held forfeited on a vacancy of the manufactory, because the only premises named was the building, and it meant where the machinery was.¹ But where the policy was on the machinery "used in the business of manufacturing leather and morocco" in a certain building, with a clause that "if a building covered by this policy shall become vacant or unoccupied, or if a mill or manufactory shall stand idle," there shall be a forfeiture, and the building in which the machinery was had stood idle, it was held that the machinery was neither a mill, nor manufactory, nor a building, but personalty, and therefore the case was distinguished from the one just preceding it, and the insurer was held liable.² In *Alkan v. N. H. Ins.-Co.*,³ there was a policy on a distillery with a vacancy clause, and a "carpenter's risk granted during the term of this policy . . . upon the express condition that the property shall not be operated as a distillery during the term of this insurance, it being intended by this policy to cover a carpenter's risk *only*." After the carpenter's work had been finished there was a loss, while the distillery was still idle, and it was held that the word "*only*" meant the excluding the extraordinary risk of running the distillery at the same time as the carpenter's work; that the policy was intended to cover the distillery; and that the insurer could not set up the vacancy clause. On an insurance on a building described as "occupied as a pork and rendering house," which being vacant at the time, "permission granted to have the within insured property remain vacant pending change of tenants," it was held on a loss before the house was tenanted, though due diligence had been used to get one, that the insured could recover.⁴

663. In a policy on a manufactory the provisions against vacancy or disuse would no doubt be held to refer to the kind of use the building was intended for, at least at the time the policy was issued; and an occupation of the property for storage of the plant or ma-

¹ *Halpin v. Aetna F. Ins. Co.*, 120 N. Y. 70.

² 53 Wis. 136.

³ *Halpin v. Ins. Co. of N. A.*, 120 N. Y. 73.

⁴ *Joy v. Pa. Ins. Co.*, 35 Mo. Ap. 165.

chinery,¹ or by an agent as caretaker,² would be a violation of the provision; though Courts are somewhat liberal in their construction as to what will constitute a continuance of the same kind of use.³ The insurance of a church by an individual must be construed with reference to the subject-matter and surrounding circumstances.⁴

To constitute occupation or use, the employment of the building must be used for some practical purpose.⁵ In Massachusetts, it was held not sufficient to constitute occupancy that the tools in a trip-hammer shop remain in the shop, and that a man went through the shop almost every day to look about to see that everything was right; and when it had remained without any practical use for thirty days (the period of the clause), it was held "an unoccupied building" within the meaning of the policy, and that the policy was void.⁶ But an elevator was held not to be vacant when the insured's papers were left there, and men were about all the time, though there was no work going on and the steam was not up.⁷

664. To the general rule as to vacancy, however, there has been held to exist the exception that a necessary absence from a store or shop will not avoid under the clause "vacant and unoccupied."⁸ Nor will a cessation of work in a mill resulting from usual causes.⁹ For example, a temporary closing of a factory for repairs, with a watchman in charge, will not forfeit under the provision against disuse, etc.¹⁰ Where a provision existed against cessation of work, and another permitting a temporary suspension for repairs, it was held that the two should be construed together, and that it was intended to allow the insured to suspend part or the whole of the work for repairs.¹¹ It has also been held that a cessation of work

¹ *Halpin v. Phoenix Ins. Co.*, 118 N. Y. 165.

² *Halpin v. Phoenix Ins. Co.*, 118 N. Y. 165.

³ *Lebanon Mut. Ins. Co. v. Erb*, 112 Pa. St. 149.

⁴ *Caraher v. Royal Ins. Co.*, 63 Hun. (N. Y.) 82.

⁵ *Halpin v. Aetna F. Ins. Co.*, 120 N. Y. 70.

⁶ *Keith v. Quincy Mut. F. Ins. Co.*, 10 Allen (Mass.), 228.

⁷ *Williams v. N. German Ins. Co.*, 24 Fed. R. 625 (S. D. Iowa).

⁸ *O'Brien v. Commer. F. Ins. Co.*, 6 J. & S. (N. Y.) 517.

⁹ *Whitney v. Black River Ins. Co.*, 72 N. Y. 117; *Albion Lead Works v. Williamsburg, Etc., Ins. Co.*, 2 Fed. R. 479 (D. Mass.).

¹⁰ *Amer. F. Ins. Co. v. Brighton Cotton Mfg. Co.*, 125 Ill. 131; *Brighton Mfg. Co. v. Reading F. Ins. Co.*, 33 Fed. R. 232 (N. D. Ill.).

¹¹ *Amer. F. Ins. Co. v. Brighton Cotton Mfg. Co.*, 125 Ill. 131.

for incapacity to procure the necessary material to work,¹ or the very high price of such,² was not a stoppage of "operation." And the fact of mills shutting down temporarily in that part of country for want of material was admitted as evidence to show a custom that it was a factor in the business, or an accident.³ Sometimes the proviso as to forfeiture is not for vacancy simply, but for vacancy or change "within the control of the insured."

665. In *N. Amer. F. Ins. Co. v. Zaenger*,⁴ a clause to the effect that should "the house become vacant and unoccupied," or "the risk increased by any other means within the control of the assured," etc., was held to mean a vacancy within the control of the assured, and that if there was a vacancy the insured must show, to recover, that the vacancy was beyond his control.⁵ In *Atlan. Ins. Co. v. Manning*,⁶ the clause was that if the property should be "vacant or unoccupied, or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the insured," and a recovery was held to lie where the vacancy was not caused by the agency of the insured, as where the agent left, but did not deliver up possession. And a "change within the control of the insured" was held to mean a change by the active agency of the insured, and not a disuse by the insured or his tenant.⁷

666. Section 2d of the Act of 1867 (New Hampshire)⁸ provided that "no policy of insurance shall be avoided by reason of any mistake or misrepresentation, unless it appears to have been intentionally and fraudulently made; but the party insuring in any action brought against them on such policy may show the facts, and the jury shall reduce the amount for which such party would otherwise be liable as much in proportion as the premium ought to have been increased if no mistake or misrepresentation had occurred." This was a re-enactment of the sixth section of the Act of 1855, c. 1662,

¹ *Amer. F. Ins. Co. v. Brighton Cotton Mfg. Co.*, 125 Ill. 131; *City v. Planing, Etc., Co. v. Merch., Mfrs. & Cit. Mut. F. Ins. Co.*, 72 Mich. 654.

² *Brighton Mfg. Co. v. Reading F. Ins. Co.*, 33 Fed. R. 232 (N. D. Ill.).

³ *City Planing, Etc., Co. v. Merch., Mfrs. & Cit. Mut. F. Ins. Co.*, 72 Mich. 654.

⁴ 63 Ill. 464.

⁵ *N. Amer. F. Ins. Co. v. Zaenger*, 63 Ill. 464.

⁶ 3 Colo. 224.

⁷ *Ga. Home Ins. Co. v. Kinnier*, 28 Grat. (Va.) 88.

⁸ Gen. Stat., c. 157.

that "no policy issued by any insurance company upon any application taken by any such agent shall be void by reason of any error, mistake, or misapprehension, unless it shall appear to have been intentionally and fraudulently made; but said company may, in any action brought against them on said policy, file in offset any claim for damage which they shall have actually suffered thereby." It was held, where a policy provided for a forfeiture if the premises should be vacant without notice to the company, etc., and a tenant who had occupied the insured building left without the knowledge of the insured, that the insured's failure to give notice was not a mistake within the statute.¹

Where the stipulation is against a vacancy for a certain period, it probably must be continuous during the whole period.² Where the policy is on different items of property, with a fixed sum as to each, it has been decided that the contract is indivisible, and that a breach as to one will avoid the whole policy.³ But the contrary has also been held.⁴

667. Where the policy provides for a notice on a vacancy the question arises, how soon must the insurer be notified? It has been held, where the insured lives in a distant place from the insurer, that three days was not unreasonable.⁵ But several weeks is inexcusable neglect.⁶ Where it is stipulated that a vacancy, etc., shall avoid unless notice be sent and a permit endorsed, a general agent would be authorized to receive the notice and allow the permit unless some special officer of the insurer is designated.⁷ And local agents, supplied with blank forms to fill up, and allowed to countersign and deliver policies, have been held entitled to allow a vacancy.⁸ But in *Harrison v. City F. Ins. Co.*,⁹ a policy which was issued upon a dwelling-house occupied by tenants, which con-

¹ *Sleeper v. N. H. F. Ins. Co.*, 5 Ins. L. J. 538 (N. H.), overruling *Chamberlain v. N. H. F. Ins. Co.*, 55 N. H. 249. See *State v. Tuttingerding*, 5 Bull. (Oh.) 464.

² *Hopkins Mfg. Co. v. Aurora F. & M. Ins. Co.*, 48 Mich. 148. ⁵ *Alston v. Old North State Ins. Co.*, 80 N. C. 326.

³ *Hartshorne v. Agricult. Ins. Co.*, 50 N. J. L. 427. ⁷ *Continen. Ins. Co. v. Ruckman*, 127 Ill. 364; *Wheeler v. Watertown F. Ins. Co.*, 10 Ins. L. J. 354 (Mass.).

⁴ *Conn. F. Ins. Co. v. Tilley*, 88 Va. 1024. ⁸ *Continen. Ins. Co. v. Ruckman*, 127 Ill. 364.

⁵ *Can. Landed Credit Co. v. Can. Agricult. Ins. Co.*, 17 U. C. Ch. 418. ⁹ 9 Allen (Mass.), 231.

tained a provision that the policy shall be "void when the occupant personally vacates the premises, unless immediate notice be given to this company and additional premium paid," was held to be forfeited on a vacancy when notice was only given to an agent of the company, whose authority was limited "to take applications and countersign policies, to collect and receive cash for premiums, and to issue a binder on special hazards for ten days," and no additional premium was paid; and it was considered immaterial that the insured did not know the extent of the agent's authority.¹ Notice to a former agent, who had issued the original policy, could not be regarded as binding on a renewed policy after the change of agency, as it is substantially a new contract.² The indorsement as to vacancy may be made after it has occurred.³ In *Wakefield v. Orient Ins. Co.*,⁴ the policy was to be avoided on a vacancy, unless "immediate notice to the company and indorsement made on the policy," and the company had reserved by another clause the right to cancel its option, and it was held that the first clause meant indorsement of the fact of notice from the insured, but not of the insurer's consent to the vacancy, for the company having the right to cancel should notify the insured on the receipt of the notice from the latter if it desired to do so. Where the policy required notice to be given of particulars when the property is vacated it is not sufficient if it does not state the removal of goods when removed.⁵

668. What constitutes a vacancy, etc., is for the jury under suitable instructions from the Court.⁶ And what is a reasonable time for the insurer in which to notify the insured of the vacancy is also for the jury.⁷

¹ *Harrison v. City F. Ins. Co.*, 9 (Ill.) 141; *Ring v. Phoenix Assur. Co.*, 145 Mass. 426; *Carr v. Roger Williams*

² *Hart. F. Ins. Co. v. Walsh*, 54 Ill. Ins. Co., 60 N. H. 513; *Vanderhoef v. Agricultural Ins. Co.*, 46 Hun. (N. Y.)

³ *Wheeler v. Watertown F. Ins. Co.*, 328; *Woodruff v. Imperial F. Ins. Co.*, 83 N. Y. 133; *Chandler v. Commerce*

⁴ 50 Wis. 532. *F. Ins. Co.*, 88 Pa. St. 223. But see *Hartshorne v. Agricult. Ins. Co.*, 50 N. H. 82.

⁵ *Hill v. Equit. Mut. F. Ins. Co.*, 58 J. L. 427. ⁶ *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; *West Assur. Co. v. Mason*, 5 Brad. 464.

CHAPTER IV.

TITLE AND INCUMBRANCES.

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669. It is presumed that a material misrepresentation as to title, incumbrances, etc., will avoid, as in other cases.¹ And that a material concealment would have the same effect.² Though the objection as to this last proposition is the extreme difficulty of laying down any fixed rule as a guide as to what may be material, besides which the insurer can readily ask concerning the title.³ However this may be, the insured is not obliged, as a general rule, to disclose the precise nature of his title unless requested.⁴ So where one is insured as mortgagor, it has been held that he need not disclose the fact that the insurance was for the benefit of the mortgagee.⁵ In a policy to the mortgagee a failure to disclose a contract between him and the mortgagor that the fund should be applied to the debt, which would take away the insurer's right to subrogation, was held not material.⁶ Nor need the amount of the mortgage debt be disclosed unless asked.⁷ In *Columbia Ins. Co. v. Cooper*,⁸ where the owner of the factory and of a greater portion of the machinery to an amount exceeding the insurance subsequently,

¹ *Adema v. Lafayette Ins. Co.*, 36 La. An. 660. 541; *Peet v. Dakota F. & M. Ins. Co.*, 20 Ins. L. J. 253 (S. Dak.); *Wytheville Ins. Co. v. Stultz*, 87 Va. 629; *Reddick v. Saugeen Mut. F. Ins. Co.*, 15 Ont. Ap. 363.

² *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25; 10 Ib. 507.

³ *Morrison v. Tenn. M. & F. Ins. Co.*, 18 Mo. 262.

⁴ *Rookford Ins. Co. v. Nelson*, 65 Ill. 415; *Mut. F. Ins. Co. v. Deale*, 18 Md. 26; *Castner v. Farmers' Mut. F. Ins. Co.*, 46 Mich. 15; *Guest v. N. H. F. Ins. Co.*, 66 Mich. 98; *Morrison v. Tenn. M. & F. Ins. Co.*, 18 Mo. 262; *Sussex Co. Mut. Ins. Co. v. Woodruff*, 26 N. J. L.

⁵ *Reesor v. Provincial Ins. Co.*, 33 U. C. Q. B. 357.

⁶ *Kernochan v. N. Y. Bowery F. Ins. Co.*, 17 N. Y. 428.

⁷ *Ogden v. Montreal Ins. Co.*, 3 U. C. C. P. 497.

⁸ 50 Pa. St. 331.

before the loss, bought in the other portion on a seizure under a landlord's warrant, it was held that he was not guilty of fraud in not describing the other title in the application.

Where no question is asked the insured is under no obligation to disclose a lease.¹ Nor need the insured, unless asked, state the incumbrances on the property.² Nor need he, when asked to state incumbrances, state their amount.³ In *Rex v. Ins. Cos.*,⁴ the fact that the property was under execution at the time the policy was executed, was held not material unless there was an improper concealment. Though where the insured was the mortgagee, it was held that the failure to disclose incumbrances prior to his own was material.⁵

670. In some Courts a distinction has been taken between concealment as to title, where the insured is insured in a mutual company and has a lien on the property, and where the insurer is a stock company; and some Courts have held where the insurer has a lien that the failure to state accurately the title will avoid.⁶

671. There is no doubt, however, that questions as to the title must be accurately answered.⁷ And a denial of an incumbrance in

¹ *Fletcher v. Commer. Ins. Co.*, 18 Pick. (Mass.) 419. *Hamburg-Bremen F. Ins. Co.*, 133 N. Y. 394.

² *Continen. Ins. Co. v. Munns*, 120 Ind. 30; *Buck v. Phoenix Ins. Co.*, 76 Me. 586; *O'Brien v. Oh. Ins. Co.*, 52 Mich. 131; *Guest v. N. H. F. Ins. Co.*, 66 Mich. 98; *Morrison v. Tenn. M. & F. Ins. Co.*, 18 Mo. 262; *Elliott v. Agricult. Ins. Co.*, 3 Atlan. R. 171 (N. J.); *Delahay v. Memphis Ins. Co.*, 8 Hum. (Tenn.) 684; *West Rockingham Mut. F. Ins. Co. v. Sheets*, 26 Grat. (Va.) 854; *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25; 10 Ib. 507; *Perkins v. Equitable Ins. Co.*, 4 Allen (N. B.), 562; *Laidlaw v. Liv. & Lond. & Globe Ins. Co.*, 13 U. C. Ch. 377; *Klein v. Un. F. Ins. Co.*, 3 Ont. R. 234; *Samov. Gore Dist. Mut. F. Ins. Co.*, 1 Ont. Ap. 545; *Stillman v. Agricult. Ins. Co.*, 16 Ont. R. 145.

³ *Hosford v. Germania F. Ins. Co.*, 127 U. S. 399.

⁴ 2 Phila. 357. See also *Weed v.*

⁵ *Smith v. Ins. Co.*, 17 Pa. St. 253. *Pinkham v. Monmouth Mut. F. Ins. Co.*, 40 Me. 587; *Merrill v. Farmers' & Mechan. Mut. F. Ins. Co.*, 48 Ib. 285; *Mut. F. Ins. Co. v. Seale*, 18 Md. 26. See also *Klein v. Un. F. Ins. Co.*, 3 Ont. R. p. 258. *Ex parte Hill*, 2 Cham. R. (U. C.) 348. And see also *Packard v. Agawam Mut. F. Ins. Co.*, 2 Gray (Mass.), 334; *Bowditch v. Mut. F. Ins. Co.*, v. Winslow, 3 Ib. 415.

⁶ *Brown v. Commer. F. Ins. Co.*, 86 Ala. 189; *McCormick v. Orient Ins. Co.*, 86 Cal. 260; *Ben Franklin Ins. Co. v. Weary*, 4 Brad. (Ill.) 74; *Collins v. St. Paul F. & M. Ins. Co.*, 44 Minn. 440; *Mullin v. Vt. Mut. F. Ins. Co.*, 54 Vt. 223; *Mackay v. Glasgow & Lond. Ins. Co.*, 4 L. R. Sup. Ct. (Mont.) 124; *Marshall v. Columbian Mut. F. Ins. Co.*, 27 N. H. 157.

a written application avoids, even where the company is foreign and cannot have a lien.¹ As the insurer is entitled to rely on the statements of the applicant, the insurer will not be charged with knowledge of the land records where the applicant's title might have been inspected.² Where answers as to incumbrances are warranted they must be true irrespective of materiality or design.³ And a warranty of title, like others, is analogous to a condition precedent.⁴ In Maine, by the Act of 1862, c. 115, re-enacted in 1871, c. 49, sec. 19, it is provided that no misrepresentation as to title or interest shall render the policy void unless material and fraudulent.⁵ In New Hampshire, under the General Statutes, c. 157, sec. 2, the misstatement of title must be fraudulent to avoid.⁶ In Georgia, by the Code, the misstatement as to title must be material to avoid.⁷

672. When the policy stipulates for a statement of material facts or information material to the risk, it has been held that such stipu-

¹ *Davenport v. New Eng. Mut. F. Ins. Co.*, 6 Cush. (Mass.) 340. *Mut. Ins. Co.*, 22 U. C. Q. B. 214; *Reddick v. Saugeen Mut. F. Ins. Co.*, 14 Ont. R. 506; *Wilby v. Standard Ins. Co.*, 3 Ib. 115; *McLead v. Cit. Ins. Co.*, 3 R. & C. (N. S.) 156. See also *Battles v. York Co. Mut. F. Ins. Co.*, 41 Me. 208; *Gould v. York Co. Mut. Ins. Co.*, 47 Me. 403.

² *Mut. F. Ins. Co. v. Deale*, 18 Md. 26.

³ *Continen. Ins. Co. v. Vanlue*, 126 Ind. 410; *Garver v. Ins. Co.*, 69 Iowa, 202; *Waller v. North. Assur. Co.*, 64 Iowa, 101; *Security Ins. Co. v. Bronger*, 6 Bush (Ky.), 148; *Beck v. Hibernia Ins. Co.*, 44 Md. 95; *Wilbur v. Bowditch Mut. Ins. Co.*, 10 Cush. (Mass.) 446; *Bowditch Mut. F. Ins. Co. v. Winslow*, 3 Gray (Mass.), 415; *Towne v. Fitchburg Mut. F. Ins. Co.*, 7 Allen (Mass.), 51; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; *Mers v. Franklin Ins. Co.*, 68 Mo. 127; *Mount Leonard Mill Co. v. Liv. & Lond. & Globe Ins. Co.*, 25 Mo. Ap. 259; *Patten v. Merch. & Farmers' Mut. F. Ins. Co.*, 38 N. H. 338; *Smith v. Empire Ins. Co.*, 25 Barb. (N. Y.) 497; *Pierce v. Empire Ins. Co.*, 62 Barb. (N. Y.) 636; *Pa. Ins. Co. v. Gottsman*, 48 Pa. St. 151; *South. Mut. Ins. Co. v. Yates*, 28 Grat. (Va.) 585; *Mullin v. Vt. Mut. F. Ins. Co.*, 54 Vt. 223; *Sabotta v. St. Paul F. & M. Ins. Co.*, 54 Wis. 687; *Schumitsch v. Amer. Ins. Co.*, 48 Wis. 26; *Muma v. Niag. Dist.*

Mut. Ins. Co., 22 U. C. Q. B. 214; *Reddick v. Saugeen Mut. F. Ins. Co.*, 14 Ont. R. 506; *Wilby v. Standard Ins. Co.*, 3 Ib. 115; *McLead v. Cit. Ins. Co.*, 3 R. & C. (N. S.) 156. See also *Battles v. York Co. Mut. F. Ins. Co.*, 41 Me. 208; *Gould v. York Co. Mut. Ins. Co.*, 47 Me. 403.

⁴ *Ind. Ins. Co. v. Brehm*, 88 Ind. 578; *Grigsby v. German Ins. Co.*, 40 Mo. Ap. 276; *Weed v. Lond. & Lancash. F. Ins. Co.*, 116 N. Y. 106; *Carpenter v. German-Amer. Ins. Co.*, 52 Hun. (N. Y.) 249. But see *Hoose v. Prescott Ins. Co.*, 84 Mich. 309.

⁵ See *Emery v. Piscataqua F. & M. Ins. Co.*, 52 Me. 322; *Fox v. Phoenix F. Ins. Co.*, 52 Ib. 333; *Bellatty v. Thomaston M. & F. Ins. Co.*, 61 Ib. 414; *Thayer v. Providence Wash. Ins. Co.*, 70 Ib. 531; *Sweat v. Piscataquis Mut. Ins. Co.*, 79 Ib. 109; *Troth v. Woolwich Mut. F. Ins. Co.*, 83 Me. 262.

⁶ *Tuck v. Hartford F. Ins. Co.*, 56 N. H. 326.

⁷ *Phoenix Ins. Co. v. Fulton*, 80 Ga. 224. See also *Klein v. Un. F. Ins. Co.*, 3 Ont. R. 234, as to statutory conditions of Canada in respect of title.

lations are not violated by a failure to state a judgment lien.¹ But it was held that it was at least for the jury to say whether the failure to state an undischarged mortgage was not material, though the note secured by it, unknown to the insured, had been voluntarily destroyed by the mortgagee.² But the omission to state a small mortgage which the vendor of the insured was under contract to pay was considered not material.³ The above stipulation, however, was held not broken by the omission to disclose the fact of an execution while the goods were in possession of the insured.⁴ Nor has the failure to state the fact of insolvency been considered material.⁵ The fact that an undescribed incumbrance is paid off before the loss will not affect the question of materiality.⁶ It has been held on the issue of the materiality of incumbrances that the insurer's agent cannot be asked whether he would not have taken the risk had the incumbrance been disclosed.⁷ The fact of materiality is for the jury.⁸

673. Where the answers of the application are not precise, and the insurer issues a policy thereon without further inquiry, this waives the necessity of a more accurate answer. As, for example, where he states the fact of incumbrances, but omits the amount;⁹ or where no answer is given to the question of incumbrances at all;¹⁰ or where the exact title is not clearly stated.¹¹ But where the policy stipulates that the title of the insured must be disclosed when less than a fee or absolute, etc., the failure to represent any title at all amounts to a declaration that the title is a fee or absolute, etc.¹²

¹ *City F. Ins. Co. v. Carrugi*, 1 Ga. 660. See also § 711. *v. Lond. Mut. F. Ins. Co.*, 10 Ont. R. 236.

² *Smith v. Niag. F. Ins. Co.*, 60 Vt. 682.

³ *Amer. Ins. Co. v. Gilbert*, 27 Mich. 429.

⁴ *Niag. F. Ins. Co. v. Miller*, 120 Pa. St. 504.

⁵ *City F. Ins. Co. v. Carriage*, *supra*.

⁶ *Crook v. Phoenix Ins. Co.*, 38 Mo. Ap. 582.

⁷ *Perkins v. Equit. Ins. Co.*, 4 Allen (N. B.), 562.

⁸ *Phoenix Ins. Co. v. Fulton*, 80 Ga. 224; *Bellatty v. Thomaston M. & F. Ins. Co.*, 61 Me. 414; *Sweat v. Piscataquis Mut. Ins. Co.*, 79 Ib. 109; *Goring*

⁹ *Bersche v. St. Louis Mut. F. & M. Ins. Co.*, 31 Mo. 555; *Jersey City Ins. Co. v. Carsons*, 44 N. J. L. 210; 43 Ib. 300.

¹⁰ *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553; *Sinclair v. Can. Mut. F. Ins. Co.*, 40 U. C. Q. B. 206.

¹¹ *Lasher v. Northw. Nat. Ins. Co.*, 55 How. Pr. (N. Y.) 324.

¹² *Ill. Mut. F. Ins. Co. v. Marseilles Mfg. Co.*, 6 Ill. 236; *Waller v. North Assur. Co.*, 64 Iowa, 101; *Reithmueller v. F. Ass'n*, 20 Mo. Ap. 246; *Mers v. Franklin Ins. Co.*, 68 Mo. 127; *Lasher v. St. Joseph F. & M. Ins. Co.*, 86 N.Y. 423.

Where, however, the application showed that the insured had not a fee simple, as required by the terms of the policy, which, however, was issued thereupon, the company is supposed to have waived the defect.¹

674. When the policy requires the disclosure of incumbrances on the subject-matter of the insurance, the point arises what may fairly come under the denomination of incumbrances. Where the insured failed to disclose the existence of a prior policy which provided for a lien by the company on the premises, and neither that policy nor a deposit note therefor, on which a small assessment had been laid but not collected, had been surrendered because the policy had been declared void for an increase of risk, it was held not to be such an incumbrance as would avoid the policy of a second company, obtained after the increase of risk had taken place, but before the avoidance had been declared.² A charge for the maintenance of a relative on a property is an incumbrance.³ But where the insured with his wife held an estate in consideration that the insured should support the grantor, which was not intended to be a lien, it was held not an incumbrance.⁴ The charge of an annuity is an incumbrance.⁵ As to the question of dower, the reader is referred to the cases in the note.⁶ And *quere*, whether in Pennsylvania a mechanic's lien is an incumbrance.⁷

675. In *Lockwood v. Middlesex Mut. Assur. Co.*,⁸ it was stated that a lease for five years was not an incumbrance, though one for a long period, as ninety years, might be; but in this case the insurer was aware of the existence of the lease.

Where it was stipulated that if the building stood on leased ground it must be so stated, and the insured had conveyed the ground on which the building had stood to the city of Boston, reserving the right to remove the buildings within a certain time, on

¹ *Lamb v. Council Bluffs Ins. Co.*, 70 Iowa, 238.

² *Jackson v. Farmers' Mut. F. Ins. Co.*, 5 Gray (Mass.), 52.

³ *Reddick v. Sangeen Mut. F. Ins. Co.*, 14 Ont. R. 506.

⁴ *Mason v. Agricultural Mut. Assur. Ass'n*, 18 U. C. C. P. 19.

⁵ *Reddick v. Sangeen Mut. F. Ins. Co.*, 15 Ont. P. 363.

⁶ *Security Ins. Co. v. Bronger*, 6 Bush (Ky.), 148; *Oh. Farmers' Ins. Co. v. Britton*, 31 Oh. St. 488; *South Mut. Ins. Co. v. Kloeber*, 31 Grat. (Va.) 739.

⁷ *Nassauer v. Susquehanna Mut. F. Ins. Co.*, 109 Pa. St. 507; *McCawley v. West Branch Ins. Co.*, 2 Luz. Obs. (Pa.) 402.

⁸ 47 Conn. 553.

pain of forfeiture, it was held that at the time of the issue of the policy the ownership as to the buildings and ground was entire and had continued up to the time of forfeiture or removal.¹ In *Cheek v. Columbia F. Ins. Co.*,² the sentences, "Is the mill leased or rented? If so, to whom and how long? A. No," were held to be intended to induce a disclosure of whether the applicant had made a lease, not whether he was lessee.

676. In *Franklin F. Ins. Co. v. Vaughan*,³ a purchaser at an auction left the goods for resale, having paid only a part of the price, and arranging that the first proceeds, up to the full amount of the price, were to go to the seller, and it was held not to be an incumbrance. A vendor's lien for the unpaid price has been held not to be an incumbrance contemplated in a policy of insurance.⁴ Though by the law of Quebec it seems it is;⁵ and in Pennsylvania, land in the hands of the vendee, with part of the price paid, has been held incumbered.⁶ A bond for the conveyance of land had been held not to be an incumbrance if the time for payment has expired, and the money may not be paid, though there has been a verbal waiver of the time by the obligor.⁷

677. The word incumbrance has been held to include the lien of judgments.⁸ Though in *Owen v. Farmers' Joint Stock Ins. Co.*,⁹ it was thought that incumbrances would only include specific liens like mortgages, and not general liens like judgments. In *Somerset Ins. Co. v. McAnally*,¹⁰ a judgment limited by consent to a specific property, other than the insured property, is not an incumbrance. A judgment of record which is paid is not a lien.¹¹ Where four judgments were not satisfied of record, but on two the sheriff had paid over the money to the judgment creditors, and on the others the judgment debtor had got the creditor's receipts acknowledging satisfac-

¹ *Washington Mills Co. v. Commer. F. Ins. Co.*, 13 Fed. R. 646 (D. Mass.).

² 4 Ins. L. J. 99 (Tenn.).

³ 92 U. S. 516.

⁴ *Dohn v. Farmers' Joint Stock Ins. Co.*, 5 Lans. (N. Y.) 275.

⁵ *Chatillon v. Can. Mut. F. Ins. Co.*, 27 U. C. C. P. 450.

⁶ *Reynolds v. State Mut. Ins. Co.*, 2 Grant Cas. (Pa.) 326.

⁷ *Newhall v. Un. Mut. F. Ins. Co.*, 52 Me. 180.

⁸ *Leonard v. Amer. Ins. Co.*, 97 Ind. 299; *Bowman v. Franklin F. Ins. Co.*, 40 Md. 620; *Brown v. Commw. Mut. Ins. Co.*, 41 Pa. St. 187.

⁹ 57 Barb. (N. Y.) 518.

¹⁰ 46 Pa. St. 41.

¹¹ *Continen. Ins. Co. v. Vanlue*, 126 Ind. 410.

tion of their judgment, it was held that the property could be said not to be incumbered.¹

It has been held where the description in the policy includes various tracts or adjoining farms, but the buildings insured are all on one tract, that an incumbrance on the tracts without buildings is immaterial, because the policy was on the buildings; and therefore the warranty as to incumbrances was only meant to apply to the tract where the insurance or buildings were.² A judgment entered against one of several partners owning a mill and the land on which it is built, is not an incumbrance by the firm, as would be a false answer to the question is there any incumbrance? where the firm made application and took the policy.³

678. The word incumbrance will also include a mortgage.⁴ And also a mortgage though unrecorded.⁵ But a mortgage that has been paid in full, though unsatisfied,⁶ or which the insured can in equity extinguish,⁷ is not an incumbrance within the policy clause. When the amount of the incumbrance which is required is misstated, and the truth of the answer is stipulated for, it is fatal to a recovery.⁸ It has been held, however, where the principal of a mortgage is correctly stated, that an answer which omits to state two months' interest was substantially correct.⁹ In *Hosford v. Germania F. Ins.*

¹ *Lang v. Hawkeye Ins. Co.*, 74 Iowa, 673.

² *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472.

³ *Miller v. Germania F. Ins. Co.*, 34 Leg. Int. 339.

⁴ *Ellis v. State Ins. Co.*, 61 Iowa, 577; *Fitchburg Savings Bk. v. Amazon Ins. Co.*, 125 Mass. 431; *Gelb. v. Internat. Ins. Co.*, 1 Dill. 443 (D. Minn.); *Burton v. Gore Dist. Mut. Ins. Co.*, 14 U. C. Q. B. 342. See also *Ind. Ins. Co. v. Brehm*, 88 Ind. 578; *Packard v. Agawam Mut. F. Ins. Co.*, 2 Gray (Mass.), 334.

⁵ *Hutchins v. Cleveland Mut. Ins. Co.*, 11 Oh. St. 477. See also *Packard v. Agawam Mut. F. Ins. Co.*, 2 Gray (Mass.), 334.

⁶ *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452.

⁷ *Ring v. Windsor Co. Mut. Ins. Co.*, 54 Vt. 434.

⁸ See *Crooks v. Phoenix Ins. Co.*, 38 Mo. Ap. 582; *Glade v. Germania F. Ins. Co.*, 56 Iowa, 400; *Hayward v. New Eng. Mut. F. Ins. Co.*, 10 Cush. (Mass.) 444; *Abbott v. Shawmut Mut. F. Ins. Co.*, 3 Allen (Mass.), 213; *Falis v. Conway, Mut. F. Ins. Co.*, 7 Ib. 46; *Smith v. Agric. Ins. Co.*, 118 N. Y. 518; *Van Buren v. St. Joseph Co. Vil. F. Ins. Co.*, 28 Mich. 398; *Byers v. Farmers' Ins. Co.*, 35 Oh. St. 606; *Ring v. Windsor Co. Mut. Ins. Co.*, 54 Vt. 434; *Ryan v. Springfield F. & M. Ins. Co.*, 46 Wis. 671; *Redmont v. Phoenix F. Ins. Co.*, 51 Ib. 292; *Sabotta v. St. Paul F. & M. Ins. Co.*, 54 Ib. 687; *Marshall v. Times F. Ins. Co.*, 4 Allen (N. B.), 618.

⁹ *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410.

Co.,¹ however, this principle was pushed very far. The questions and answers were: Q. "Is there any incumbrance?" A. "Yes." Q. "If a mortgage, to what amount?" A. "\$3000." And it was held that the omission to state that there was somewhat less than six months' interest due was not a breach of warranty.²

679. Under the facts in the last cited case, it was also held that the omission to state a lien for taxes was not a breach of warranty, and *quere* if a lien for unpaid taxes is an incumbrance.³ A sale for taxes, where the purchaser has a lien for the price paid with ten per cent. interest, is an incumbrance.⁴ In New York it was held that a warrant of attachment under section 231 of the Code was not a lien on personal or real property until a levy.⁵

680. A distinction has been taken between incumbrances that the insured had created voluntarily, and which had been created without his volition. Thus, in *Hosford v. Hart. F. Ins. Co.*,⁶ the sentence, Q. "Is there a mortgage, deed of trust, lien, or incumbrance of any kind on property; amount, and in whose favor?" was held to apply only to incumbrances created voluntarily by the consent of the applicant; but that an existing lien for unpaid taxes need not be disclosed, because it was created by law. Liens or charges which, though apparently legal on the records, are in point of fact for some reason void or voidable, do not if omitted constitute a breach of the clause as to incumbrances, etc.⁷ And the execution of a deed of trust of which the trustee was ignorant, though he had agreed it might be done without any surrender of the control of property, will not affect the representation of a fee simple title.⁸

681. It is often doubtful, where the insurance is on a chattel, whether the condition is intended to apply to the land where the chattel is, or whether it is intended to apply at all. Where the stipulation was, if the interest or property be not a fee as to land or

¹ 127 U. S. 399.

² *Hosford v. Germania F. Ins. Co.*, 127 U. S. 399.

³ *Ib.*

⁴ *Wilbur v. Bowditch Mut. F. Ins. Co.*, 10 Cush. (Mass.) 446.

⁵ *Leonard v. Vandeburgh*, 8 How. Pr. (N. Y.) 77.

⁶ 127 U. S. 404.

⁷ See *Lockwood v. Middlesex Mut.*

Assur. Co., 47 Conn. 553; *Lycoming Ins. Co. v. Jackson*, 83 Ill. 302; *Newman v. Springfield F. & M. Ins. Co.*, 17 Minn. 123; *Cheek v. Columbia F. Ins. Co.*, 4 Ins. L. J. 99 (Tenn.); *Runkle v. Citizens' Ins. Co.*, 6 Fed. R. 143 (S. D. Oh.).

⁸ *Walsh v. Vt. Mut. F. Ins. Co.*, 11 Ins. L. J. 530 (Vt.).

absolute as to personalty, it must be disclosed, it was held, both interests must be less than absolute to avoid.¹ In a policy on personalty which contained questions wholly inapplicable to chattels alone, and the insured answered that there was no incumbrance; and when about to explain about the land which was incumbered the agent stopped him, it was held that the questions related to the realty, and the statements as to incumbrances were therefore not untrue.² Where a policy was on a stock in trade and on shop fixtures in a building, and the applicant, who was obliged to state whether her title was a fee or leasehold, said fee, it was held that this only related to the building and not to the goods, which were not hers.³

As the insured need not state incumbrances unless asked, questions as to future incumbrances do not affect those already existing.⁴ Where the application is to form a part of the policy and the title is described in the indicative mood, but nothing is warranted as to the future; and there is a change in the title between the application and the issue of the policy, the application has been held to refer only to the title at the date of the application, and not at the date of the policy.⁵

682. The clause providing for the avoidance of the policy if the property should be described otherwise than it really was, was held to relate to a misdescription of the character of the thing offered for insurance, and not to the insured's title or interest therein.⁶ Where the policy provided for an avoidance if the assured "cause the buildings to be described otherwise than as they really are, so that they be charged at a lower premium than is hereby proposed," the agent's evidence of his opinion as to the rate the premises could have been insured at by other companies, and his knowledge as to the rates actually charged for policies on buildings of a like character, was admitted by the trial Judge.⁷

683. Where the stipulation is that the insured shall state others

¹ Rankin v. Andes Ins. Co., 47 Vt. 157; Day v. Hawkeye Ins. Co., 72 Iowa, 597; Dutton v. New Eng. Mut.

² Ashford v. Victoria Mut. Assur. Co., F. Ins. Co., 29 N. H. 153. See also 20 U. C. C. P. 434. Ottawa Agric. Ins. Co. v. Sheridan, 5

³ Butler v. Standard F. Ins. Co., 4 Duv. (Can.) 157. Ont. Ap. 391.

⁴ Dwelling-House Ins. Co. v. Hoffman, 125 Pa. St. 626.

⁶ Heath v. Franklin Ins. Co., 1 Cush. (Mass.) 257.

⁷ Martin v. Franklin Ins. Co., 42 N.

⁵ Schroeder v. Trade Ins. Co., 109 Ill. J. L. 46.

who are interested, etc., it was held, where the lessee had erected buildings on the leasehold, with the option to remove at the termination of the lease, or with the landlord's reserved right to buy, with the landlord's lien reserved, that the landlord was not "interested" in the lessee's property.¹ In *Agricultural Ins. Co. v. Montague*,² where the applicant, who was the contractual purchaser of an organ, the title to which did not pass till full payment of the price, and only half was paid, was required to state if any one else had any interest, it was held that he could not insure as owner beyond his interest. It has been stated that a contingent right of dower is not an interest of another in land.³

684. A failure to disclose an incumbrance is not a breach of a condition to give a true exposition of all facts and circumstances in regard to the condition, situation, value, and risk of property, so far as the same are known to the insured and material to the risk and material to be known to the company.⁴ And a requirement to expose all facts, etc., as to "condition, situation, value, or occupancy" of the subject is not violated by the omission to state a tax lien or a proposed oral contract to sell.⁵ Nor is the failure to state a mechanic's lien a violation of the conditions to give a just and true exposition of the condition, valuation, and situation of the risk.⁶ Nor will the omission to disclose a written agreement to convey the realty insured, for which the greater part of the price had been paid prior to the agreement, prevent a recovery where it was provided that the application must contain a just, full, and true exposition of all facts and circumstances in regard to the condition, value, and risk of the property.⁷ The words "a just and true exposition of all facts in regard to the condition, situation, value, and risk of the property," cannot be said to apply to the question whether the interest of the owners is joint or held in severalty.⁸ Where, however, the

¹ *Merch. Ins. Co. v. Frick*, 2 Amer. L. Rec. 336 (Oh.).

² 38 Mich. 548.

³ *Peet v. Dakota F. & M. Ins. Co.*, 20 Ins. L. J. 253 (S. Dak.); *South. Mut. Ins. Co. v. Kloeber*, 31 Grnt. 739. But see *Security Ins. Co. v. Bronger*, 6 Bush (Ky.), 146.

⁴ *Samo v. Gore Dist. Mut. F. Ins. Co.*, 1 Ont. Ap. 545.

⁵ *Alkan v. N. H. Ins. Co.*, 53 Wis. 136.

⁶ *McCawley v. West Branch Ins. Co.*, 2 Luz. Obs. (Pa.) 402.

⁷ *Davis v. Quincy Mut. F. Ins. Co.*, 10 Allen (Mass.), 113.

⁸ *Kerr v. Hastings Mut. F. Ins. Co.*, 41 U. C. Q. B. 217.

applicant stated that the answers were a just, full, and true exposition of the condition, situation, value, and risk of property, so far as material to the risk, and that he was subject to the by-laws, which provided for a forfeiture unless the true title and interest was expressed, a failure to disclose a prior mortgage was held to avoid.¹ A clause to give a true account of all circumstances surrounding the title and condition of realty was held violated by the omission to disclose the fact that possession had been taken by a second mortgagee; especially in this case, where there was also a clause against such a taking subsequently, which showed the company thought it material.² Where there existed a clause that a "full, fair, and substantially true representation of all facts and circumstances respecting the property so far as within the knowledge of the insured and material," should be made; and two partners insured a building, stating that they owned the land on which it was, though, in point of fact, one of them, to whom the policy was payable, owned it, and the other was charged on their books with half its cost; on a loss, after the dissolution of the firm and a transfer of the building to the co-partner, to whom the insurers with notice said the policy should "stand good," it was held that the insurer was liable; for the misrepresentation was not material, as one partner held the legal, and the firm the equitable title.³

685. The policy frequently provides that the applicant shall truly and particularly state his title where his interest is "other than the entire, unconditional, and sole ownership;" or, if his "interest or property be leasehold; or, that of mortgagee or any other interest not a fee simple;" or, if he is not the "sole, absolute, and unconditional owner;" or, "entire, absolute, unconditional, and sole owner;" or, if the "interest . . . be a leasehold or other interest not absolute;" or, if he has "a less estate than a fee simple;" or, "other than the entire, unconditional, and sole ownership;" or, "if the property insured be a building standing on ground not owned by the assured in fee simple;" or, a "less estate than a fee simple unincumbered as to the buildings, and the land covered by the same;" or, where the applicant has not "the whole value and ownership;"

¹ Bowditch Mut. F. Ins. Co. v. Winslow, 3 Gray (Mass.), 415.

² Collins v. Charlestown Mut. F. Ins. Co., 10 Gray (Mass.), 155.

³ Jacobs v. Eagle Mut. F. Ins. Co., 7 Allen (Mass.), 132.

or, a title "not absolute or that is less than a perfect title;" or, if "a building is insured that is on leased ground;" or, if "the building stands on leased ground;" or, is "not a fee simple unincumbered;" or, is not "absolute;" or is not "a good, perfect, and unincumbered title;" or, that "the interest of any other should be stated;" or, that there should be a true statement as to "title, interest, and incumbrances." And it may be stated as a general rule where such provisos contain no special reference to incumbrances or to an incumbered title *eo nomine*, as in several of the latter clauses, that the conditions of such provisos may be fulfilled by evidence of a title in fee, though incumbered by mortgages or liens.¹ Nor in such a case would a fee be the less so where there is a lease;² or where there is an inchoate courtesy.³ Nor is an absolute title the less so because there is a conditional sale of goods which remain in the seller's hands.⁴

686. The general theory of such of the above clauses is, then, that the character of the title or ownership is intended, and not the matter of liens or incumbrances;⁵ and that a less estate than a fee, etc., means one of less duration, as a fee tail or life-estate, or a tenancy for years or at will.⁶

¹ See *Hubbard v. Hartford F. Ins. Co.*, 33 Iowa, 325; *Clay F. & M. Stock Ins. Co. v. Beck*, 43 Md. 358; *Taylor v. Ætna Ins. Co.*, 120 Mass. 254; *Dolliver v. St. Joseph Co. F. & M. Ins. Co.*, 128 Mass. 315; *Strong v. Mfg. Ins. Co.*, 10 Pick. (Mass.) 40; *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300; *Kronk v. Birmingham F. Ins. Co.*, 91 Pa. St. 300; *Chandler v. Commerce F. Ins. Co.*, 88 Pa. St. 223; *Carrigan v. Lycoming F. Ins. Co.*, 53 Vt. 418; *Manhattan F. Ins. Co. v. Weill*, 28 Grat. (Va.) 389; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507; *Franklin F. Ins. Co. v. Vaughan*, 92 U. S. 516; *De Armand v. Home Ins. Co.*, 28 Fed. R. 603 (W. D. Mich.); *Ellis v. Ins. Co. of N. A.*, 32 Ib. 646 (S. D. Iowa); *White v. Agricultural Mut. Assur. Co.*, 22 U. C. C. P. 98; *Perkins v. Equitable Ins. Co.*, 4 Allen (N. B.), 562; *Sinclair v. Can. Mut. F. Ins. Co.*, 40 U. C. Q. B. 206; but see *contra*, *Kennedy v. Agricultural Ins. Co.*, 1 R. & C. (N. Sc.) 433; *McLead v. Citizens' Ins. Co.*, 3 Ib. 156.

² *Ins. Co. v. Haven*, 95 U. S. 242; *Perkins v. Equit. Ins. Co.*, 4 Allen (N. B.), 562. See also *Dresser v. United Firemen's Ins. Co.*, 45 Hun. (N. Y.) 298. See *Hand v. Williamsburgh City F. Ins. Co.*, 57 N. Y. 41.

³ *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53.

⁴ *Carrigan v. Lycoming F. Ins. Co.*, 53 Vt. 418.

⁵ See *Carson v. Jersey City F. Ins. Co.*, 43 N. J. L. 300; *Manhattan F. Ins. Co. v. Weill*, 28 Grat. (Va.) 389; *Ellis v. Ins. Co. of N. A.*, 32 Fed. R. 646 (S. D. Iowa).

⁶ *Swift v. Vt. Mut. F. Ins. Co.*, 18 Vt. 305.

With regard to what is intended, where the insured states that he has a title in fee, it has been held that a man who has a deed in fee simple, though the price is unpaid, may be styled holder in fee simple.¹ And also where the insured was in possession at the issue of the policy under agreement to pay by instalments, part of which had been paid.² Where the deed had been made out, but was held in escrow as security for the price, and the vendee had possession and a complete title at the loss, it was held that it was not a misrepresentation to say that he had a title in fee at the policy's issue.³ So a warranty of a fee has been held fulfilled by the vendee's possession, payment of the price, and a written contract of sale, though no deed was delivered.⁴ Where a deed made to A. & B. operated to convey the estate to A. alone, who stated that he had a fee, A. may be called the owner in fee.⁵ And perhaps a vendee may be loosely called owner in fee who can compel specific performance of the sale.⁶ In Virginia an answer of "a fee," was supported by evidence of a life estate, with a contingent remainder in the applicant, though there was a small reversionary interest in a relative.⁷

But one holding an agreement for a deed to be delivered on the performance of conditions, with evidence of non-performance, has not a title in fee.⁸ Nor has a mortgagee.⁹ In *Andes Ins. Co. v.*

¹ *O'Neil v. Ottawa Agric. Ins. Co.*, (Tenn.) 503; *Wooddy v. Old Dominion Ins. Co.*, 31 Grat. (Va.) 362; *Johannes v. Standard F. Office*, 70 Wis. 196;

² *Humphrey v. Lond. & Lancash. Ins. Co.*, 2 Nov. Scot. Dec. 39.

³ *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. Ap. 252. And see generally *South. F. Ins. Co. v. Lewis*, 42 Ga. 587;

Bonham v. Iowa Cent. Ins. Co., 25 Iowa, 328; *Pelton v. Westchester F. Ins. Co.*, 77 N. Y. 605; *Dohn v. Farmers' Joint Stock Ins. Co.*, 5 Lans. (N. Y.) 275; *Lorillard F. Ins. Co. v. McCulloch*, 21 Oh. St. 176; *Cochran v. Ins. Co.*, 2 Bull. (Oh.) 54; *Imperial F. Ins. Co. v. Dunham*, 117 Pa. St. 460;

Elliott v. Ashland Mut. F. Ins. Co., 117 Ib. 548; *Millville Mut. F. Ins. Co. v. Wilgus*, 88 Ib. 107; *Franklin F. Ins. Co. v. Crockett*, 7 Lea (Tenn.), 725; *Manhattan F. Ins. Co. v. Barker*, 7 Heis.

⁴ *Lewis v. New Eng. F. Ins. Co.*, 24 Blatch. 181 (S. N. N. Y.).

⁵ *Weber v. Amer. Cent. Ins. Co.*, 35 Mo. Ap. 521.

⁶ *East Texas F. Ins. Co. v. Dyches*, 56 Texas, 565. See *Capital City Ins. Co. v. Caldwell*, 10 So. 355 (Ala.).

⁷ *Haden v. Farmers' & Mech. Ins. Ass'n*, 80 Va. 683.

⁸ *Pangborn v. Continental Ins. Co.*, 62 Mich. 638.

⁹ *Brown v. Gore Dist. Mut. Ins. Co.*, 10 U. C. Q. B. 353.

Fish,¹ A. stated she had a "fee simple, B. holds a deed of trust for \$2500." In fact A. had by deed a life interest with remainder to the heirs of her body by her husband, and it was held that this was a sufficient statement of what her title was, under the clause to state less than a fee, etc., as above. It has been held the ownership of the building, with a contract to buy the land on which it stood, is not an ownership in fee simple;² for buildings permanently annexed to the land are freehold, and therefore a statement or answer of "fee simple" implies that land is held like buildings.³

687. A "perfect title" was held in Connecticut one good in law and equity, and to exclude the idea of an existing mortgage.⁴ But where any but a "good and perfect title" must be disclosed, and A. owning the building and B. the stock applied for a policy, which was issued to them as joint owners, it was held that they both together had a good and perfect title, which need not be particularly described.⁵

When the title was required to be described or disclosed, if not "absolute," and a policy correctly described an absolute title, and the title deed, which did not, was corrected on discovery of this after a loss, it was held that the policy was not avoided, because all the time the insured had a right to an absolute title, and when he got it it related back.⁶ A vendee in possession, with the price paid and a verbal promise from the vendor to him to sell, was held the absolute owner.⁷ But an agreement by a purchaser, founded on no consideration to allow the vendor debtor to repurchase, together with the execution of a lease to him, on which rent has been paid, but nothing towards the redemption of the property, will not create an absolute interest in the latter.⁸ One has been held to have an absolute title or ownership who purchases at a foreclosure sale, though before a deed is executed, and before the expiration of the

¹ 71 Ill. 620. See *McCulloch v. Norwood*, 58 N. Y. 562.

² *Birmingham v. Empire Ins. Co.*, 42 Barb. (N. Y.) 457.

³ *Pangborn v. Continen. Ins. Co.*, 62 Mich. 638. See also *Froehly v. North St. Louis Mut. F. Ins. Co.*, 32 Mo. Ap. 302.

⁴ *Warner v. Middlesex Mut. Assur. Co.* 21 Conn. 444.

⁵ *Peck v. New Lond. Co. Mut. Ins. Co.*, 22 Conn. 575.

⁶ *Diehlman v. Dwelling-House Ins. Co.*, 78 Mich. 141.

⁷ *Hough v. City F. Ins. Co.*, 29 Conn. 10.

⁸ *Mers v. Franklin Ins. Co.*, 68 Mo. 127.

debtor's equity of redemption, on the theory that when he should get the fee it would relate back to the inception of the title.¹ An absolute title exists where one has the whole beneficial interest, but the mere naked legal title is in another.² Or where one really has the whole interest, but there is a dry trust in another.³

But an absolute title does not exist by virtue of a sale under a mechanic's lien which was void through want of jurisdiction.⁴ Nor is a life-estate, as a tenancy by the curtesy, a fee.⁵ Nor is any life-estate an absolute estate.⁶ Nor is an estate held by a husband in trust for his wife and her children, with a remainder to his children in the event of her death without issue, an absolute title in the wife.⁷

688. The stipulation as to a sole and unqualified title is not fulfilled by a title taken by a party for the benefit of a foreign company not entitled by the laws of the State where the realty was to take the title in its own name.⁸ *West. & A. Pipe Lines v. Home Ins. Co.*,⁹ may be referred to as a decision upon the point that one may be a sole owner of his share or proportion of an undivided amount of oil held in tanks and owned in common with other people. Where A. and B. are partners, A. furnishing all the stock and capital, and B. to share in the profits, it has been held that A. may insure as having an absolute title.¹⁰

It has been held that the insurance company cannot go into the equities that exist between partners. Thus, in *City F. Ins. Co. v. Mark*,¹¹ where A. took some goods as a payment of a debt due the firm, but being doubtful if his partner would approve his act sent them to his own house and sold them to B., who took with the insurer's consent the policy and goods, it was held that the equities between A. and his partner could not be considered in this suit, and that the insurer, having assented to the assignment, was bound. But

¹ *Gaylord v. Lamar Ins. Co.*, 40 Mo. 13.

² *Martin v. State Ins. Co.*, 44 N. J. L. 485.

³ *Lebanon v. Mut. Ins. Co.*, Erb., 112 Pa. St. 149; *Swift v. Vt. Mut. F. Ins. Co.*, 18 Vt. 305.

⁴ *Porter v. Aetna Ins. Co.*, 2 Flip. 100 (W. D. Mich.).

⁵ *Leathers v. Farmers' Mut. F. Ins. Co.*, 24 N. H. 259.

⁶ *Davis v. Iowa St. Ins. Co.*, 67 Iowa, 494.

⁷ *Murphrey v. Old Dominion Ins. Co.*, 5 Ins. L. J. 297 (D. N. C.).

⁸ *Amer. Basket Co. v. Farmville Ins. Co.*, 3 Hughes, 251 (E. D. Va.).

⁹ 145 Pa. St. 346.

¹⁰ *Irving v. Excoelsior F. Ins. Co.*, 1 Bos. (N. Y.) 507.

¹¹ 45 Ill. 482.

where one partner gave, as his share of capital to the firm, the use of a mill he owned, which was used for firm purposes but was not part of the assets or rented, and reverted to the owner on the dissolution which took place before the loss, it was held that a statement in a policy that it was "theirs" was not true under the title clause.¹

A quit-claim deed from a second mortgagee, who was also one of two assignees in bankruptcy, will not give a "sole" title, as the equity of redemption remained in the assignees.² In Illinois, it was held that the mere equity of redemption after a sale did not constitute a sole and unconditional title.³ In *Barnard v. Nat. F. Ins. Co.*,⁴ a sale and written contract and deed, which latter was held in escrow to secure the price, was held not a sole or unconditional interest.⁵ A lessee with an option to buy at the expiration of the lease, with the right to remove any buildings he had erected, may insure as having the sole interest.⁶ In *Commer. F. Ins. Co. v. Allen*,⁷ it was held that the erection of a party-wall on the insured premises under agreement does not show that the interest was not entire. It has been held, where the legal title of a chattel mortgage is in the mortgagee, that the mortgagor has not a sole and unconditional title.⁸

689. The question arises what interest or title the insured must have to insure the property as "belonging" to him, or as "owner," or as "mine," "his."

A policy to a mortgagor, on a building foreclosed but with the unexpired equity to redeem, who was not asked any questions as to title, was held valid when issued on the building, as belonging to him.⁹ But on an application signed "A. Co., B. Treas.," the subject being warranted to be the applicant's, when in fact it belonged to B., it was held a breach where the policy was issued to the A. Co.¹⁰

¹ *Cit. F. Ins. Co. v. Doll*, 35 Md. 89.

² *Porter v. Aetna Ins. Co.*, 2 Flap. 100 (W. D. Mich.).

³ *Reaper City Ins. Co. v. Brennan*, 58 Ill. 158.

⁴ 27 Mo. Ap. 26.

⁵ See *Reynolds v. State Mut. Ins. Co.*, 2 Grant Cas. (Pa.) 326.

⁶ *Merch. Ins. Co. v. Frick*, 2 Amer. L. Rec. 336 (Oh.).

⁷ 80 Ala. 571.

⁸ *Woodward v. Republic F. Ins. Co.*, 32 Hun. (N. Y.) 365.

⁹ *Essex Sav. Bk. v. Meriden F. Ins. Co.*, 57 Conn. 335.

¹⁰ *Abbott v. Shawmut Mut. F. Ins. Co.*, 3 Allen (Mass.), 213.

In *Catron v. Tenn. Ins. Co.*,¹ a man insured the whole of a property in his own name for his own benefit, not stating that he was only an owner of half, and it was held a material concealment to such an extent as to avoid the policy.

690. When the word "owner" is employed, as it often is, unartificially and without a precise import, it becomes difficult to determine what weight the parties intended should be attached to it. It has been held that one may be insured as "owner," who has erected a building on land for which he has no deed, but which he has purchased and paid the price for.² A man may also be an "owner" who has purchased at sheriff's sale, but who has not yet got an acknowledged deed.³ And a vendee with an equitable title may be an "owner;"⁴ or one with the whole beneficial interest;⁵ or one in possession under a conditional purchase, the conditions of which have not been broken, though as yet not entirely fulfilled;⁶ or one who has purchased land from an infant for \$60, to be paid when the latter reaches twenty-one, and gets a deed and puts up a building, because if the infant refused to ratify the insured could remove the buildings.⁷ A husband, it has been held in Missouri, may honestly insure goods turned over to him by a parol transfer, by his wife.⁸

But in *Brown v. Williams*,⁹ where there was a clause as to the untruth of a material condition, and the insured stated that he only "was owner," though, in fact, he had only a bond containing conditions for a deed attached which were never performed, it was held that he could not recover. And in *Falis v. Conway Mut. F. Ins. Co.*,¹⁰ the holder of a bond for the conveyance of an estate, conditioned on the payments of certain sums, was held not in any sense "the owner."

In Canada the owner of buildings erected by him on a leasehold

¹ 6 Humph. (Tenn.) 176.

² *Chase v. Hamilton Mut. Ins. Co.*, 22 Barb. (N. Y.) 527.

³ *Susquehanna Mut. F. Ins. Co. v. Staats*, 102 Pa. St. 529.

⁴ *Lorillard F. Ins. Co. v. McCulloch*, 21 Oh. St. 176.

⁵ *Liv. & Lond. & Globe Ins. Co. v. McGuire*, 52 Miss. 227.

⁶ *Mattocks v. Des Moines Ins. Co.*, 74

Iowa, 233; *Farmers' Mut. F. Ins. Co.*

v. Fogelman, 35 Mich. 491; *Hinckley v. Germania F. Ins. Co.*, 140 Mass. 38;

Burson v. F. Ass'n, 136 Pa. St. 267.

⁷ *Brogdon v. Mfr's & Merch. Mut. F. Ins. Co.*, 15 Can. L. J. 31.

⁸ *Travis v. Continen. Ins. Co.*, 47 Mo. Ap. 482.

⁹ 28 Me. 252.

¹⁰ 7 Allen (Mass.), 46.

may describe himself generally as owner.¹ But a lessee with the privilege of buying has been held not to be an "owner."² Nor is a tenant for years.³ But it has been held a tenant for life is.⁴ A mortgagee, not in possession, cannot say that he is the owner of an incumbered property.⁵ Where an insured building was built on leased land, but under the agreement that at the termination of the lease it should belong to the landlord, an answer that the insured owned the property but not the land, was held a breach of contract.⁶ Where the insured owns the building, which stands on leased ground, and implying that he owns the property in fee, does not insure the property specifically as a chattel, this is a breach; and evidence is not admissible to show that he could remove the house at the end of the lease.⁷ But in Pennsylvania⁸ and Massachusetts,⁹ an absolute ownership of the buildings appears sufficient. In *Williamson v. Niag. Dist. Mut. Ins. Co.*,¹⁰ where the insured was required to state the true title and incumbrances, if not a fee, and answered that he was owner, which was alleged to be untrue; as there was a mortgage; it was held on a traverse of the assertion of a mortgage and the alleged misstatement, that the word "owner" did not imply a fee, but merely notified the insurer of some title, and the fact of the mortgage was denied.

691. In Illinois the rule is very broad, and an "owner" is held to mean the holder of any insurable interest.¹¹ In *Rockford Ins. Co. v. Nelson*,¹² the declaration averred that the insured was "owner," but there was no warranty as to title in the policy. And it was held that all that need be proved was that the insured had

¹ *Hopkins v. Provincial Ins. Co.*, 18 U. C. C. P. 74. See *Brogdon v. Mfr's & Merch. Mut. F. Ins. Co.*, 15 Can. L. J. 31.

² *Walrath v. St. Lawrence Co. Mut. Ins. Co.*, 10 U. C. Q. B. 525.

³ *Crockford v. Lond. & Liv. Ins. Co.*, 5 Allen (N. B.), 152.

⁴ *Sauvey v. Isolated Risk Ins. Co.*, 16 Can. L. J. 30.

⁵ *Jenkins v. Quincy Mut. F. Ins. Co.*, 7 Gray (Mass.), 370.

⁶ *Cuthbertson v. N. C. Home Ins. Co.*, 96 N. C. 480.

⁷ See *Birmingham v. Empire Ins. Co.*, 42 Barb. (N. Y.) 457; *Ben Frank-*

lin F. Ins. Co. v. Weary, 4 Brad. (Ill.) 74; *Stickney v. Niagara Dist. Mut. Ins. Co.*, 23 U. C. C. P. 372; *Compton v. Mercant. Ins. Co.*, 27 U. C. Ch. 334;

Phillips v. Grand River F. Ins. Co., 46 U. C. Q. B. 334.

⁸ *Hope Mut. Ins. Co. v. Brolaskey*, 35 Pa. St. 282.

⁹ See *Curry v. Commw. Ins. Co.*, 10 Pick. (Mass.) 535.

¹⁰ 14 U. C. C. P. 15.

¹¹ *Lycoming F. Ins. Co. v. Jackson*, 83 Ill. 302; *Rockford Ins. Co. v. Nel-*

son, 65 Ill. 415.

¹² 65 Ill. 415.

an insurable interest ; for the right to recover depended on the fact whether he was the owner of an insurable interest, and not whether he was the "absolute owner" of the property ; and it could not be held, as in a conveyance of land, that the word owner meant absolute owner. In other words, the insured was not bound to disclose his title, and if he said that he was "owner," that only meant that he had an insurable interest.

In Kentucky it was held that a representation of ownership as to the whole of a tract of land, of which the insured owned one-fourth, and was entitled, as against his co-tenants, to that part in which the insured building stood, would not avoid ; as the warranty by statute must be material to avoid, and this was not material.¹ In Texas, it was held that a surviving husband, having possession of the community or property of himself and his deceased wife, which he held after her decease with their children, with the right to dispose of for his debts, may be called "owner."²

Insuring as "owner" does not necessitate the disclosure that a projected railway is located through the insured premises for which the insured claims damages.³ In *Sherboneau v. Beaver Mut. F. Ins. Ass'n*,⁴ where the clause asked for the true state of the title, it was held that a man was not the owner who has had thirty-seven years' possession of Crown land in Canada, if at the issue of the policy a stranger claims it under a patent and is contesting it.

Where it is obvious from the insured's description that it is impossible that he can own the ground, as on a policy on a building at a United States Army Post owned by the Government, it has been held that the title clause is clearly repugnant to the written description and does not apply.⁵

It has been held that one may be an "owner" who has made but not delivered a bill of sale of goods, though he had taken security for the payment of a note for the price.⁶ And it has been held that the term "owner" may be used by a pledgee of goods.⁷

¹ *Kenton Ins. Co. v. Wigginton*, 89 N. W. R. 455 (Minn.). See also *Lamb v. Council Bluffs Ins. Co.*, 30 N. W. R. Ky. 330.

² *Merch. Ins. Co. v. Dwyer*, 1 Pos. 497 (Iowa).
(Tex.) 441.

³ *Perkins v. Equit. Ins. Co.*, 4 Allen 9 Gray (Mass.), 23.
(N. B.), 562.

⁴ 30 U. C. Q. B. 472.

⁵ *Broadwater v. Lion F. Ins. Co.*, 26 v. *Citizens' Ins. Co.*, 19 L. Can. J. 175.

692. The provision that the insured must state his interest, if it be not the "entire, unconditional, sole ownership, for use and benefit of insured," must be complied with.¹ It is not complied with by proof of an undivided interest in land, as that of tenant in common.² Nor where one has a half interest, though the owners of the other half agree to let him have the other half, in the absence of any consideration for the promise.³ But the owner of an equitable title need not state it, as a vendee legally in possession with part of the price paid and under an agreement to insure for the vendor.⁴

Where the insurer described as "his two-story dwelling-house" property he had purchased and of which he had taken a title bond for the conveyance, but it turning out that the vendor had only a life-estate with a remainder in six-sevenths, a suit was brought to perfect the title; and the insured had an outstanding purchase note which he owned at the issue of the policy and at the loss, it was held that he was the sole and unconditional owner.⁵ Where the applicant stated that he was sole owner and that there was no mortgage, and that he held by contract, though in fact he was under a contract of purchase of the land and had only paid a small part of the price, and was to hold as tenant by suffrance till all the instalments were paid, and his purchase was to be forfeited if they were not paid; it was held that he had conveyed by his language a false impression.⁶

One in possession by virtue of a verbal gift from a relative with a promise of a deed in fee simple, is not a sole and unconditional owner.⁷

693. Nor is the wife where she insures as hers the goods belonging to the husband.⁸ Or the husband where he insures his wife's property as his.⁹ But it has been held the husband and wife

¹ *Henning v. West. Assur. Co.*, 77 Iowa, 319. *Franklin F. Ins. Co. v. Crockett*, 7 Lea (Tenn.), 725.

² *Scot. Un. & Nat. Ins. Co. v. Petty*, 21 Fla. 389; *Noyes v. Hartford F. Ins. Co.*, 54 N. Y. 668. ⁶ *Hinman v. Hartford F. Ins. Co.*, 35 Wis. 159.

³ *Miller v. Amazon Ins. Co.*, 46 Mich. 463. ⁷ *Wineland v. Security Ins. Co.*, 53 Md. 276.

⁴ *Dupreau v. Hibernia Ins. Co.*, 76 Mich. 615. ⁸ *Reithmueller v. F. Ass'n*, 20 Mo. Ap. 246.

⁵ *Williams v. Buffalo German Ins. Co.*, 17 Fed. R. 63 (D. Ky.). See also *Eminence Mut. Ins. Co. v. Jesse*, 1 Met. (Ky.) 523. In this case, however, the company had a lien by charter on the

may jointly insure her separate estate as sole and unconditional owner.¹

694. In an insurance of the firm goods by the surviving partner, in which the estate of a deceased partner had an interest, it was held, though the surviving partner succeeded to the legal title in trust for the deceased partner, that it was a trust, and that he could not be said to have the sole and unconditional title for his sole own use and benefit.² One employing another to buy and to sell a chattel on a speculation, the latter to be paid for his time in a share of the profits, may be said to be the sole and unconditional owner.³

In many cases the fact of a vendor's lien for the price within the clause has been held immaterial.⁴ Though the contrary has been held.⁵ The owner of property has been said to be sole and undisputed, though a suit pends to subject the property to the payment of a judgment obtained against a former owner after he had conveyed it, on the ground that he had conveyed it to defraud creditors, because the action was not to question ownership, but to establish a lien.⁶ The existence of a mortgage does not prevent the insured from being the sole and unconditional owner.⁷ But a lien holder or a mortgagee⁸ or a pledgee⁹ is not the sole and unconditional owner. Where the plaintiffs had made, to a plantation owner on a cotton crop, advances which appeared to be more than the value of the whole crop, which latter was to be delivered to them as security for repayment of the advances, it was held that they were sole owners within the meaning of the policy, as no one else practically had any interest therein.¹⁰

Where a man individually and in common with others owned a

property of the insured, and this was a principal feature in the decision.

¹ *Perry v. Faneuil Hall Ins. Co.*, 11 Fed. R. 482 (D. R. I.).

² *Crescent Ins. Co. v. Camp*, 64 Tex. 521.

³ *Boutelle v. Westchester F. Ins. Co.*, 51 Vt. 4; *Welch v. Ins. Co.*, 23 W. Va. 288.

⁴ See *Franklin F. Ins. Co. v. Crockett*, 7 Lea (Tenn.), 725; *Manhattan Ins. Co. v. Barker*, 7 Heisk. (Tenn.) 503; *Woody v. Old Dominion Ins. Co.*, 31 Grat. (Va.) 362.

⁵ *Farmers' & Drovers' Ins. Co. v. Curry*, 13 Bush (Ky.), 312.

⁶ *Lang v. Hawkeye Ins. Co.*, 74 Iowa, 673.

⁷ *Westchester F. Ins. Co. v. Weaver*, 70 Md. 536. See *Vankirk v. Cit. F. Ins. Co.*, 79 Wis. 627.

⁸ *Waller v. North. Assur. Co.*, 64 Iowa, 101. See 10 Fed. R. 232 (N. D. Iowa).

⁹ *McCormick v. Springfield F. & M. Ins. Co.*, 66 Cal. 361.

¹⁰ *Noyes v. Hart. F. Ins. Co.*, 54 N. Y. 668.

number of barrels of oil stored in a warehouse, and insured them "his own or held in trust for others," it was held that the clause as to sole ownership, etc., was not under these circumstances applicable, but that the company was liable up to the insured's interest in the oil.¹

Where there is a dispute as to whether the goods alleged to have been lost belonged to the insured or to some one else, it is for the jury.² And the question, under the sole ownership clause, etc., as to whether the insured was the owner is, so far as the facts are concerned which make the title, for the jury.³

695. The words "mine," or "his," or "their" are untechnical and do not always convey a precise idea. In New York the statement that the insurance was desired upon "his two buildings" by the occupier of them was considered merely to describe or indicate the property.⁴ And generally, where one describes the property in respect of which the policy is intended to issue as "his," it does not imply an unincumbered fee simple in law,⁵ but this description may be fulfilled by an equitable ownership.⁶ Or by the interest of a vendor, pending negotiations for a contract of sale of the property up to the time fixed for performance of the contract.⁷ In *Buffum v. Bowditch Mut. F. Ins. Co.*,⁸ a policy provided for an avoidance unless the "true title" were expressed in the proposal. There was a clause as to the insurer's lien, and also as to a declaration, etc., of the risk, value, title, and interest of the insured. The insured called the property "his," but stated it was incumbered. There were two mortgages on it by the former owner, whose equity of redemption had been sold to a third party before the insured got his title. And it was held, as the insured had an equity to redeem the equity under the Rev. Sts., c. 73, sec. 24, and then to remove the other incumbrances and get an absolute title, that there was no misrepresentation of title. But after an equity to redeem has expired the mortgagee's simple agreement to extend it is without consideration, and a policy

¹ *Grandin v. Rochester German Ins. Co.* 15 W. N. C. (Pa.) 1.

² *Planters' Mut. Ins. Co. v. Engle*, 52 Md. 468.

³ *Pittsburg Ins. Co. v. Frazee*, 14 Ins. L. J. 512 (Pa.).

⁴ *Rohrbach v. Germania F. Ins. Co.*, 62 N. Y. 47.

⁵ *Mut. F. Ins. Co. v. Deale*, 18 Md. 26.

⁶ *Tyler v. Aetna F. Ins. Co.*, 12 Wend. (N. Y.) 507; *Aetna F. Ins. Co. v. Tyler*, 16 Ib. 385.

⁷ *Gill v. Can. F. & M. Ins. Co.*, 1 Ont. R. 341.

⁸ 10 Cush. (Mass.) 540.

by the late owner of equity on it is void, when he represented the property as "his."¹

In *Smith v. Bowditch Mut. Ins. Co.*,² where it was provided that the true title should be expressed, and the applicant described it as "his," but in fact only had a bond for conveyance to him on the performance of certain conditions, and the policy expressly established a lien on his interest of property, it was held that the policy was avoided. When A., who was required to state the true interest and title, stated that it was "A.'s," though he had bought in the property on execution prior to the expiration of the debtor's right to redeem, the insured was allowed to recover.³ In *Michigan*, where there was the clause as to an absolute title, and the only answer was "their," it was held that proof that the insured at the issue of the policy had contracted to sell, and the vendee had paid the purchase-money in full, avoided.⁴ In *Columbian Ins. Co. v. Lawrence*,⁵ A. and B. were entitled to one-third of the property by deed and two-thirds as mortgagees, but held one moiety of the whole under an agreement which had not been complied with, and which purported to be void if uncomplied with, though the other contracting party had not called for compliance; they described the property as "belonging" to A. and B., and it was held it could not be considered as truly described by the above description.

696. It has been held that the husband's right in his wife's property would usually be covered by the description of "his."⁶ In *Curry v. Com'th Ins. Co.*,⁷ A. built a house on his father's land, which on the latter's death, after the former's, descended to A.'s two sisters with another house on it. The husband of one purchased from the husband of the other the choice of houses, and, after the former's selection of one, the latter occupied the other as his own, and insured and described it "as his own;" it was held, as he had a freehold in the land by virtue of his wife, and the exclusive right and possession and disposal of the house, that the representa-

¹ *Essex Sav. Bk. v. Meriden F. Ins. Co.*, 57 Conn. 335.

² 2 Pet. 25; 10 Ib. 507.

³ 6 Cush. (Mass.) 448.

⁴ *Mut. F. Ins. Co. v. Deale*, 18 Md. 26.

⁵ *Clapp v. Un. Mut. F. Ins. Co.*, 27 N. H. 143.

But see *Trott v. Woolwich Mut. F. Ins. Co.*, 83 Me. 362.

⁷ 10 Pick. (Mass.) 535.

⁶ *Clay F. & M. Ins. Co. v. Huron, Etc., Co.*, 31 Mich. 346.

tion, though somewhat inaccurate, was not enough so to avoid the policy.

Where there was a clause in a policy as to a full, fair, and substantially true representation of the facts so far as material, a widow holding the property of her husband under a will for life, in answer to the question as to title, said that the land was "hers;" there was no disposition of the remainder, and the children did not claim during twelve years, six of which had passed prior to the application, and it was held sufficient.¹

697. In *Brown v. Commer. F. Ins. Co.*,² "his," in answer to a question as to the title, with the clause as to sole and unconditional ownership, and that the true interest must be stated, was held to imply sole ownership; and proof of only a leasehold interest in the land on which the building stood, and that the personalty was held under an executory contract of sale with the price unpaid, is a breach. But it has been also held by a lower Court in New York, that a tenant may insure the leasehold as "his;"³ though the contrary has been held in Upper Canada.⁴ In *Fowle v. Springfield F. & M. Ins. Co.*,⁵ in Massachusetts, the lessees of land for a term of years removed, under the provisions of their lease, a building thereon and erected a new one, which was to be delivered up to the lessor at the end of the term. They effected insurance on the building, describing it as "their two-story brick and gravelled roof building, occupied by them," "situate on leased land." The policy provided "that the interest of the assured, whether as owner, consignee, factor, lessee, or otherwise in the property to be insured, shall truly be stated in the policy, otherwise the same shall be void;" and it was held that they could recover on the policy.

698. A shareholder insuring the corporate building as theirs, cannot be said to have in it a fee simple.⁶ The description of property as "his" would be fulfilled when made by a pledgee of realty;⁷ or by a pledgee of chattels pledged by a bill of sale, where

¹ *Allen v. Charlestown Mut. F. Ins. Co.*, 5 Gray, 384.

² 86 Ala. 189.

³ *Niblo v. N. Amer. F. Ins. Co.*, 1 Sand. (N. Y.) 551.

⁴ *Shaw v. St. Lawrence Co. Mut. Ins. Co.*, 11 U. C. Q. B. 73.

⁵ 122 Mass. 191.

⁶ *Phillips v. Knox Co. Mut. Ins. Co.*, 20 Oh. 174.

⁷ *Walsh v. Fire Ass'n*, 127 Mass. 383.

the legal title was in the pledgee, though the chattels had been allowed to remain in the custody of the pledgeor.¹

699. Where the title is asked and the answer is "by deed" or "warranty deed," this is not a representation that the title is in fee simple,² or of any particular kind of title;³ and where a person is asked what his or her title is, it may be indeed no answer to say by deed; though it has been held, where a *feme covert* applied for a policy on 'land deeded to her husband, in which she had an *inchoate* dower interest, it might be considered as a general description of interest.⁴ If the applicant asserts his title to be by a warranty deed, it obviously does not imply that there are no incumbrances, or that the title is free from the equities in favor of third parties.⁵ In *Rohrbach v. Germania F. Ins. Co.*,⁶ the answer to the question "Is your title absolute? If not, state its nature and amount," was, "my deceased wife held the deed;" and it was held that this was not an answer that was unequivocal, where the insured had neither a legal nor equitable title, but only an interest in his deceased wife's realty to the extent of a lien, and the residue after payment of her debts, for which the personalty was insufficient.⁷

700. In *Clark v. German Mut. F. Ins. Co.*,⁸ it was held that a policy taken by the insured as the "National Slipper Company," does not imply the existence of a corporation, nor that the title is held by several people, as one man may so trade; it is not therefore a breach of a clause that the "true title" should be set forth.

Where a lienholder insures, and the policy asks that his interest be expressed, the answer "mechanic's lien" is sufficient; and he need not state that the liened building stood on leased ground, or that he had no judgment on his lien.⁹ Where it was provided that the policy would not attach where the insured had a less estate than a fee, unless the true title and the incumbrances be expressed, it was held, on an insurance by the holder of a deed which created a lien

¹ *Little v. Phoenix Ins. Co.*, 123 Mass. 380.

² *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452.

³ *Rockford Ins. Co. v. Nelson*, 65 Ill. 415.

⁴ *Dacey v. Agricultural Ins. Co.*, 21 Hun. (N. Y.) 83.

⁵ *Pavey v. Amer. Ins. Co.*, 56 Wis. 221.

⁶ 62 N. Y. 47.

⁷ *Amer. Cent. Ins. Co. v. McLana-* than, 11 Kan. 533.

⁸ 7 Mo. Ap. 77.

⁹ *Longhurst v. Conway F. Ins. Co.*, Bates' Ins. Dig. 641 (N. D. Iowa).

on the property to secure a debt, but which also gave the same lien to other creditors in an equal degree without preference, that it was void because the interest of the other lienholders was omitted.¹ Where it was stated in the policy that the building was on leased ground, and it was shown that the agent saw the lease which gave the lessor a lien for the whole rent, it was held to be a sufficient disclosure of the title, which was asked to be particularly described when less than a fee.²

It has been held that the indorser of a mortgage note may be described as mortgagee.³ Where one plaintiff takes an assignment of a first mortgage on the property which was to be insured in trust for all the plaintiffs, and has completed a negotiation for purchase of the interest of the mortgagee in a second mortgage, under which title has been perfected by a foreclosure, a statement by the plaintiffs that they were mortgagees in possession will not avoid the policy.⁴ In *Wyman v. People's Equity Ins. Co.*,⁵ A., the applicant, not describing the title as hers, took a policy in which there was a "true title clause;" and in answer to the point of incumbrance said, "First mortgage to A.;" and in fact A. had entered for a breach of condition by the mortgagor. A. also stated that there was no other insurance by the first mortgagee. Held, this was not a violation of the true title clause; and sufficiently described A.'s title, which was that of first mortgagee. In *Davis v. Quincy Mut. F. Ins. Co.*,⁶ a policy on the interest of "a mortgagee in possession" in a building "occupied by a tenant," will cover it, though another person was in occupation of the premises, under an agreement from the insured to convey, and the full conditions of sale were complied with, as the vendee was a mere tenant.

701. Where the clause as to absolute title, etc., exists, it has been held that this does not mean a title that the insured can never be afterwards dispossessed of, but simply a reasonably valid title.⁷

¹ *Addison v. Ky. & Louisville Ins. Co.*, 7 B. Mon. (Ky.) 470.

² *Dresser v. Unit. Firemen's Ins. Co.*, 45 Hun. (N. Y.) 298.

³ *Williams v. Roger Williams Ins. Co.*, 107 Mass. 377.

⁴ *Nichols v. Fayette Mut. F. Ins. Co.*, 1 Allen (Mass.), 63.

⁵ 1 Allen (Mass.), 301.

⁶ 10 Ib. 113.

⁷ *Monroe Co. Mut. Ins. Co. v. Robinson*, 5 W. N. C. (Pa.) 389; *Farmers' & Meehan. Mut. Ins. Co. v. Meckes*, 10 Ib. 306; *Swift v. Vt. Mut. F. Ins. Co.*, 18 Vt. 305; *Miller v. Alliance Ins. Co.*, 7 Fed. R. 649 (S. D. N. Y.). See also

If no question is asked as to a pending litigation, it need not be stated.¹ And where there is a stipulation in the policy that the property has not been subject to litigation while in the present hands, any evidence is excluded as to litigation which does not relate to the present occupation or to the present proprietor.² It has been held that the title-deed to the insured property, which was apparently valid, could not be subsequently attacked by the insurer.³ Nor could he show a subsequent breach of condition.⁴ Nor can the insurer plead a fraud which was practised by the insured on third parties in obtaining the title to the subject-matter, for the deed is only voidable.⁵ And in a suit by a claimant under a bill of sale from the owner of the subject-matter against the owner's agent, who had procured a policy at his principal's direction "for whom it might concern," and had been paid the loss, it has been held that the agent cannot plead that the bill of sale was made by his principal to defraud creditors.⁶ But though the insurer may not be able to set up the insured's fraud on a third party in obtaining a title deed, if the deed is void for fraud in its execution, it has been held that this may be pleaded by the insurer.⁷

702. Many insurers require property, not owned by the insured, but held in trust for others, to be so described in the policy. It will be observed that this phrase, "goods held in trust," does not mean in any sense a technical equitable trust, but is to be understood in a loose or mercantile sense, and means goods held by a bailee, trustee, or agent, etc.⁸ Thus, articles deposited with the insured for sale,⁹ or held in pawn,¹⁰ come under the condition. Where

Continen. Ins. Co. v. Ware, 9 Ins. L. J. 519 (Ky.); *Phoenix Ins. Co. v. Bowdre*, 67 Miss. 620. *Ins. Co.*, 2 Han. (N. B.) 235. See *Caraher v. Royal Ins. Co.*, 63 Hun. (N. Y.) 82.

¹ *Hill v. Lafayette Ins. Co.*, 2 Gibbs (Mich.), 476; *Cheek v. Columbia F. Ins. Co.*, 4 Ins. L. J. 99 (Tenn.). See also *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330.

⁶ *Newson v. Douglass*, 7 H. & J. (Md.) 417.

⁷ *Phoenix Ins. Co. v. Mitchell*, 67 Ill. 43.

² *Andes Ins. Co. v. Shipman*, 77 Ill. 189.

⁸ See *Home Ins. Co. v. Balto. Warehouse Co.*, 93 U. S. 527; *Hough v. People's F. Ins. Co.*, 36 Md. 398; *Phoenix Ins. Co. v. Favorite*, 49 Ill. 259.

³ *Home Ins. Co. v. Gilman*, 112 Ind. 7.
⁴ *McBride v. Republic F. Ins. Co.*, 30 Wis. 562.

⁹ *Brichta v. N. Y. Lafayette Ins. Co.*, 2 Hall (N. Y.), 372.

⁵ *Phoenix Ins. Co. v. Mitchell*, 67 Ill. 43; *Hickman v. North Brit. & Mercant.*

¹⁰ *Rafel v. Nashville M. & F. Ins. Co.*, 7 La. An. 244.

A. received a deed to property to secure him from loss, which might be assumed by the grantor, with a written agreement to reconvey or of indemnification, this is property held in trust within the clause.¹ And where a tenant took out a policy on realty, with a transfer indorsed to his landlord with a recital that he effected it as his agent for his use, this comes within the clause.²

In Canada, in *McBride v. Gore Dist. Mut. F. Ins. Co.*,³ the owner's name was required, and it was held that a bank, holding warehouse receipts for grain, indorsed to their order, was the legal owner and not the insured, who had given and indorsed them. In *South Australian Ins. Co. v. Randell*,⁴ corn was deposited by farmers with a miller, to be used as the latter's stock or capital in trade. It was mixed with other corn so deposited, subject to the right of the farmers to claim an equal bulk without reference to specific bulk, or in lieu the market price, and it, the contract, was held a barter or sale, and not a bailment; and, therefore, that the miller could claim the value of the corn lost on a policy as his own, though it had not been insured in trust and commission as required, if actually so held; because, it was said, on a bailment is reserved the right to claim a redelivery of the property in an unchanged state from the bailor, and here the farmers could only claim an equal amount of a similar article or its money value, but not the identical article. Where the insured was bailee of goods stored in a place of deposit with his own, which, on insuring, he described as goods "stored therein," and the policy had a sole ownership clause, it was held that the words "stored therein" were description, and that he could only recover on his own property on a loss.⁵

In *Phoenix Ins. Co. v. Hamilton*,⁶ it was held that a policy may be effected in the name of a nominal partnership, where the business is carried on for the use of one partner; and where the subject-matter, grain, is held on commission and described as held in trust or on commission, sold, but not delivered; and when the subject is under the custody or keeping of others, and so known to the insurer, the omission to inform the insurer of an agreement of the above

¹ *Day v. Charter Oak F. & M. Ins. Co.*, 51 Me. 91.

² *Keely v. Ins. Co.*, 1 Phila. 175.

³ 30 U. C. Q. B. 451.

⁴ L. R. 3 P. C. 101.

⁵ *Fuller v. Phoenix Ins. Co.*, 61 Iowa, 350.

⁶ 14 Wall. 504.

firm's dissolution, which was previously made, is not a concealment, as the policy was on goods held in trust.

It has been held that a policy of insurance upon the insured's "stock of clothing manufactured and in process of manufacture," providing that the company shall not be liable for "loss for property owned by any other party, unless the interest of such party is stated on this policy," will not cover cloth owned by others, but taken by the insured to be manufactured under a written agreement, under which the same is to be at the manufacturer's risk, even to the value of his work thereon.¹

In Maryland, under the stipulation requiring the insured's interest "as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise," to be truly stated, and the insured agreed in addition to state everything material, it was held that a mortgage which had not been stated avoided it.² Where the policy requires a declaration of property held "in trust or appointment of a Court or as collateral," this does not include a secret trust made to defraud creditors.³ It has been held, where nothing is said as to the title of such property by the insured, who accepts a policy with one of the above conditions as to property held in trust, that he is supposed not to hold the property solely in his own right, and cannot recover if he do.⁴

The clause "This insurance shall cease from the time the property hereby insured shall be levied on, etc.," was held obviously to include only subsequent levies.⁵ And a forfeiture for a "change in the title or possession" refers to a change after the issue of the policy.⁶

Where the policy is on different items of property, it has been held that a forfeiture as to one will avoid as to all.⁷ Though some Courts hold the contract divisible.⁸

¹ *Getchell v. Aetna Ins. Co.*, 14 Allen (Mass.), 325.

² *Westchester F. Ins. Co. v. Weaver*, 70 Md. 536.

³ *Ayres v. Hartford F. Ins. Co.*, 17 Iowa, 176.

⁴ *Baltimore F. Ins. Co. v. Loney*, 20 Md. 20.

⁵ *Rex v. Ins. Co.*, 2 Phila. 357. See *French v. Roger*, 16 N. H. 177.

⁶ *Allemania F. Ins. Co. v. Peck*, 133 Ill. 220.

⁷ *Geiss v. Franklin Ins. Co.*, 123 Ind. 172.

⁸ *Pratt v. Dwelling-House Mut. F. Ins. Co.*, 130 N. Y. 206; *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 110 N. C. 176.

703. The notice of incumbrances, etc., must be given as required by the agreement. As a rule, knowledge of an incumbrance which is acquired by a director of a company through hearsay or privately, is not notice to the insuring company, for it is not acquired in an official capacity.¹ On the other hand, it has been held that the agent's written report to insurer of the risk is not admissible on the part of the insurer to show that the property was not notified as incumbered, as the insured was not a party to this report.²

¹ General Ins. Co. v. U. S. Ins. Co.,
10 Md. 517.

² Phoenix Ins. Co. v. La Pointe, 5 W.
Rep. 512 (Ill.).

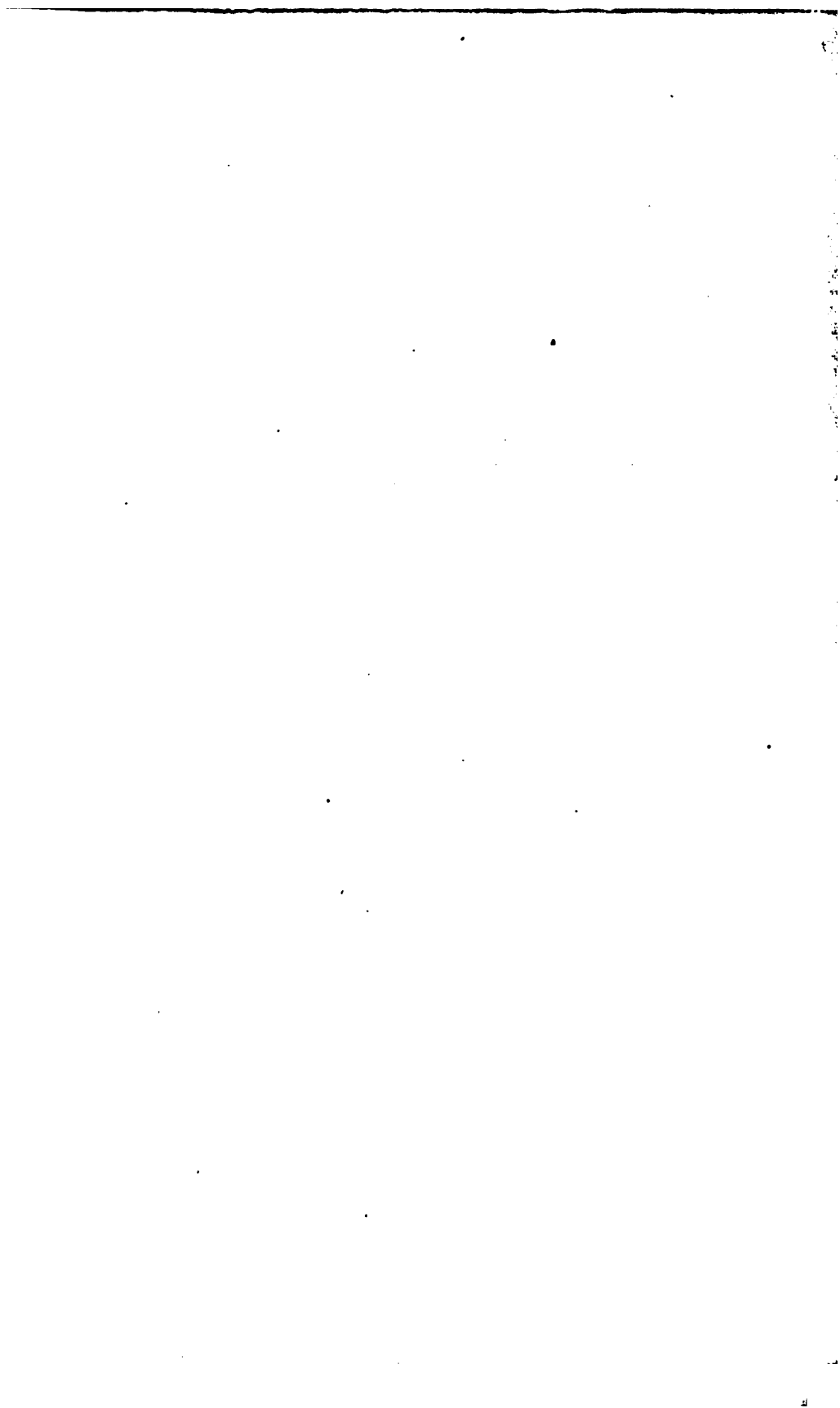
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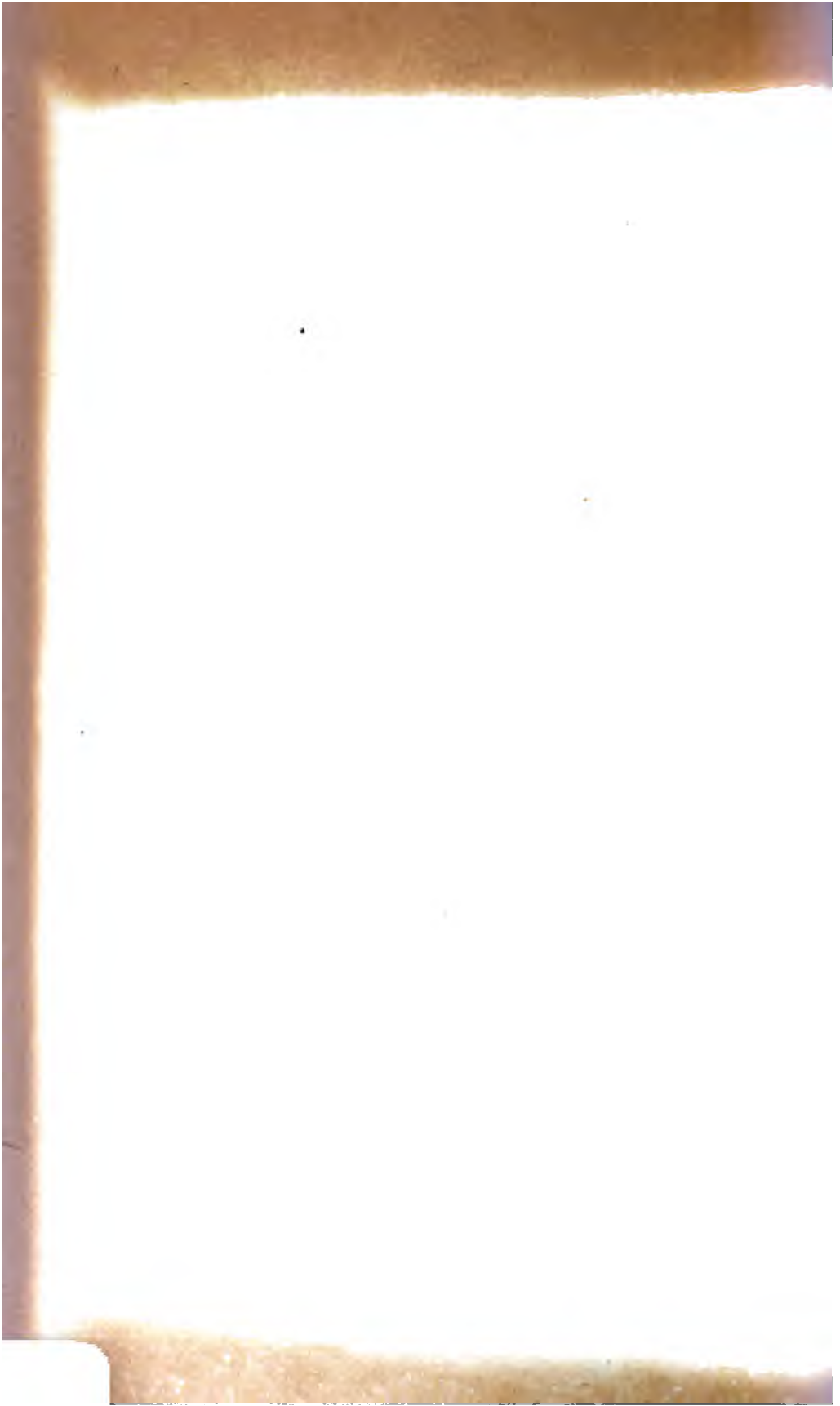
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